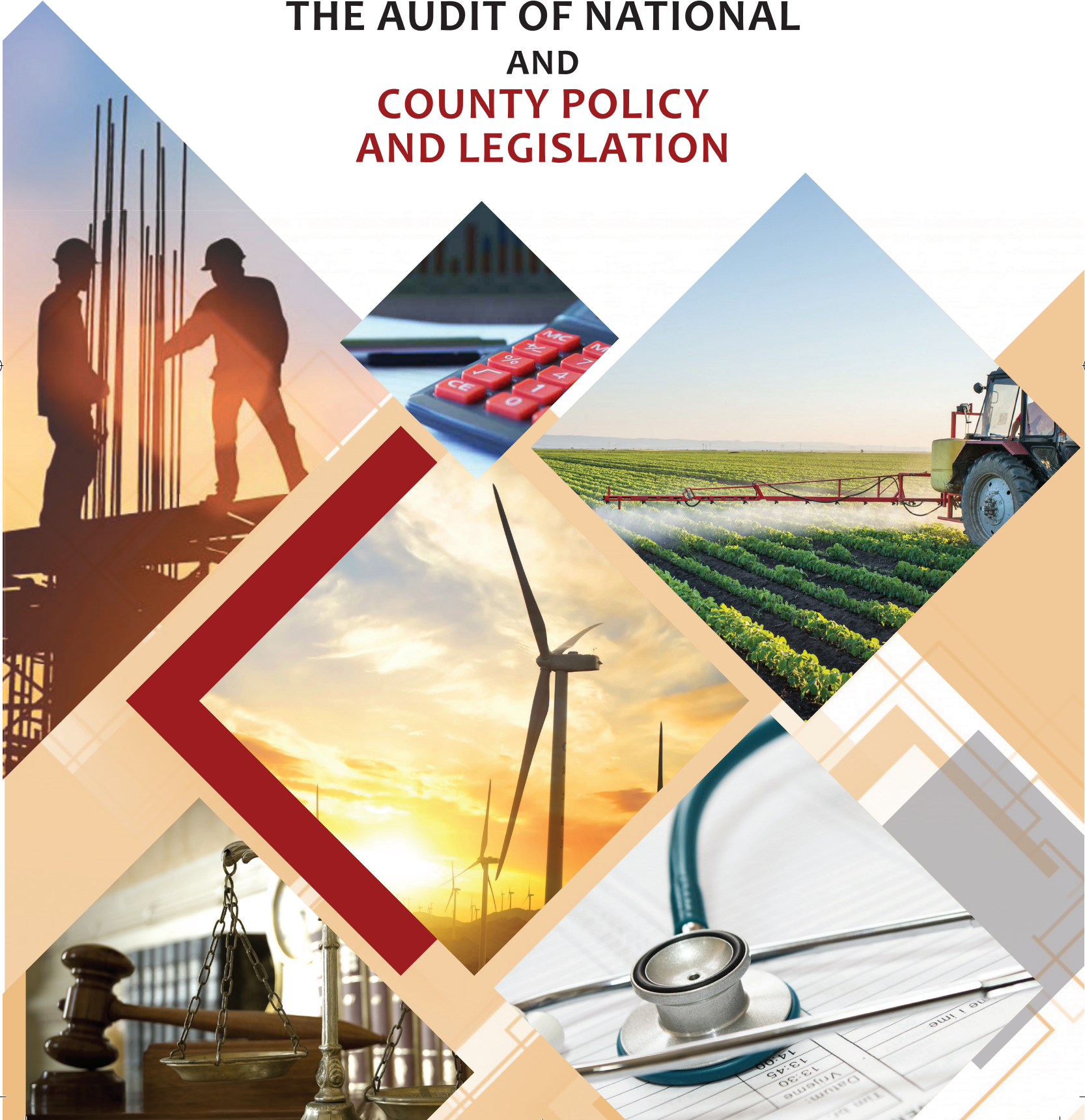


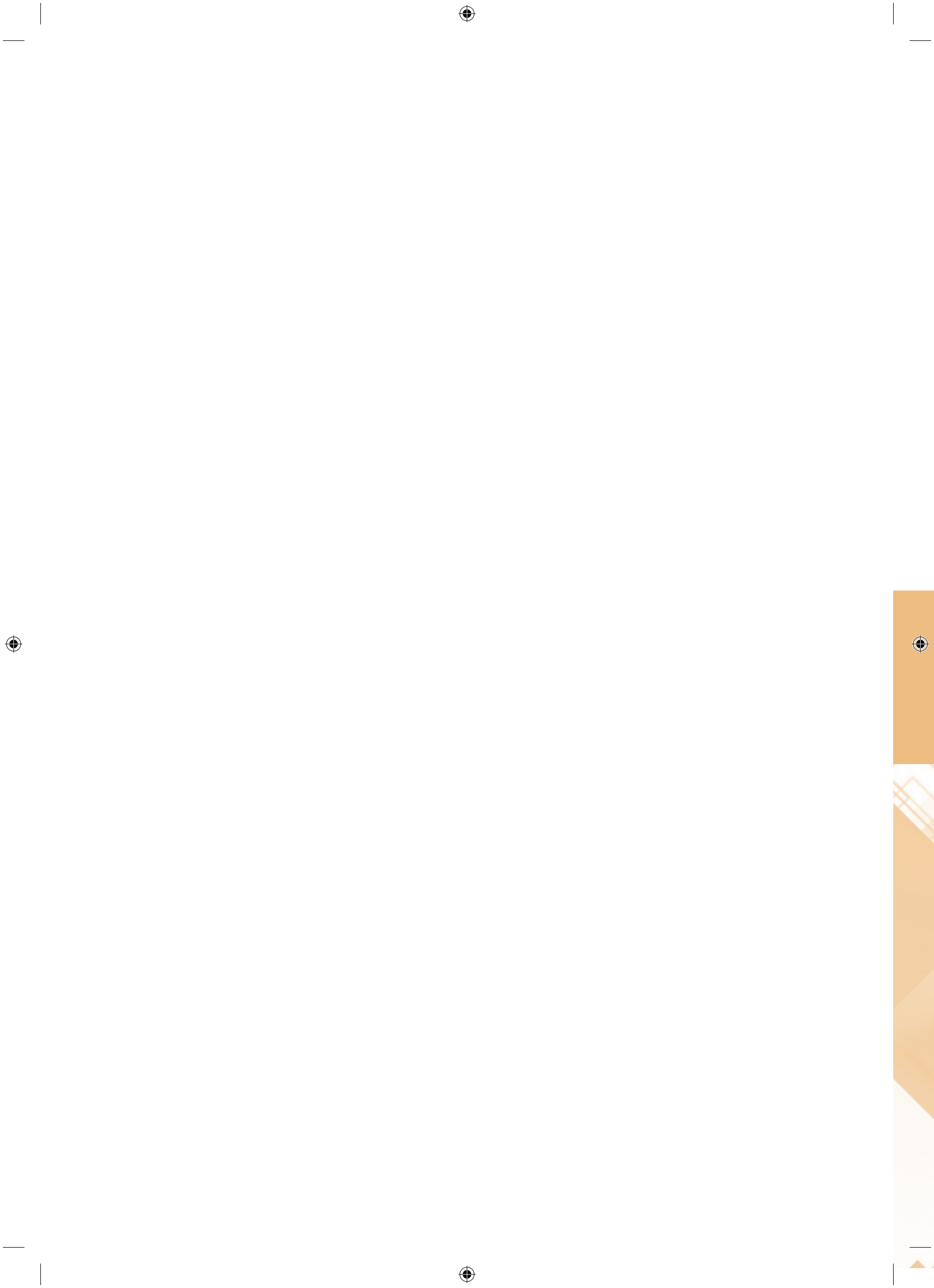


Council of Governors



REPORT ON THE AUDIT OF NATIONAL AND COUNTY POLICY AND LEGISLATION







**REPORT ON
THE AUDIT OF NATIONAL AND
COUNTY POLICY AND LEGISLATION**



A publication by:

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Abbreviations & Acronyms

AHADI	Agile and Harmonized Assistance for Devolved Institutions
CARA	County Allocation of Revenue Act
CoG	Council of Governors
KLRC	Kenya Law Reform Commission
CARA	County Allocation of Revenue Act
SAGA	Semi Autonomous Government Agency
WDF	Ward Development Fund
ICT	Information and Communications Technology
NLP	National Land Policy
EPC	Export Promotion Council
PPA	Physical Planning Act
CIC	Commission for the Implementation of the Constitution
KENAS	Kenya Accreditation Service
CFSP	County Fiscal Strategy Paper
NFNSP	National Food Nutrition Security Policy
KHSSIP	Kenya Health Sector Strategic Investment Plan
CS	Cabinet Secretary
FMCA	Forest Management and Conservation Act
IDLO	International Development Law Organization
IGR	Intergovernmental Relations
IGRA	Intergovernmental Relations Act
IGRTC	Intergovernmental Relations Technical Committee
KARLO	Kenya Agricultural Research and Livestock Organization
KEPHIS	Kenya Plant Health Inspectorate Service
KLRC	Kenya Law Reform Commission
MTP	Medium Term Plan
NACADA	National Authority for the Campaign Against Drug Abuse
PFM	Public Finance Management
PFMA	Public Finance Management Act
RDA	Regional Development Authority
UNDP	United Nations development Programme
MDA	Ministries Departments Agencies

Foreword by Chairman, Council of Governors



In the year 2010, Kenya promulgated a new Constitution which introduced a two tier system of governance: the National Government and forty-seven (47) County Governments. The Fourth Schedule of the Constitution assigns thirty-five (35) functions to the National Government under part one (1) and fourteen (14) functions to County Governments under part two (2). Devolved functions primarily focus on service delivery to the citizens. County Governments have been bestowed with both legislative and executive authority to facilitate the performance of their functions and exercise of their powers.

It is however worth noting that despite the strides made in the country with respect to the devolved system of governance, existing and in force are still National laws that were enacted before the promulgation of the Constitution. Some of these laws undermine devolution by dint of the structures they had created and the powers they had conferred on various institutions, thereby impeding devolution's full implementation. On this premise, CoG and KLRC initiated the legal and policy audit aimed at scrutinizing National and County policies and laws with a view to establishing their alignment to the Constitution, specifically the devolved system of governance.

The study reveals that there are a myriad of National laws and policies that are not in tandem with the Constitution. Some of the key recommendations highlighted in the report are that some National laws need to be repealed while others require amendments in order to ensure conformity with the Constitution. For stakeholders to improve the policy and legislative environment that devolution operates in, they should read the report and collaborate in its implementation. This will ensure that both the National and County laws and policies conform to the letter and spirit of the Constitution, eventually leading to improved service delivery to the people of Kenya.

Thank you!

H.E. Hon. FCPA Wycliffe Ambetsa Oparanya, EGH, CGJ

Chairman, Council of Governors

Foreword by the Attorney General



This Report is the product of a study commissioned by the Council of Governors (CoG) and the Kenya Law Reform Commission (KLRC) across seven sectors, the key objectives of which were to audit the county government policies and legislation with the view of analysing their compliance with the Constitution, to audit all the national policy and legislation with a view of ascertaining the extent to which they conform to the devolved system of governance and to identify gaps and challenges and make recommendations for harmonization and alignment.

The sectors prioritized were Agriculture, Health, Natural Resource Management, Land and Physical Planning, Urban Development, Trade and Investment and Public Finance Management.

At this point in time, and while Kenya is still in transition from the old constitutional order to the new constitutional dispensation, it is clear from the Report that there are significant challenges around the extent of compliance with the laid down constitutional, legal and policy frameworks with respect to governance at both levels of government that need to be addressed. The Report provides the general trends that need to be tackled in the quest for compliance with the constitutional framework. Some of the notable findings include ambiguities in legislation, persistence of the old order in terms of laws, policies and practices across all sectors under review, inadequate consultation and cooperation between the two levels of government that can support and facilitate holistic development of laws and policies and a dearth of capacity to facilitate effective development of laws and policies that are clear, coherent, comprehensive and compliant with applicable constitutional provisions.

The Report has been enriched by the generous, earnest and thoughtful insights by sector experts through a peer review process. Further, the involvement of the stakeholders in reviewing the initial reports provided invaluable input in exploring together the serious topics that surround our common governance goal in addition to extensive discussion with the national and county government officials, civil society organizations, and representatives of the community-based organizations and networks that deal with sectoral governance issues.

As stated above, I wish to reiterate that this Report presents a comprehensive audit of the national and county legislation and policy approach and reveals the gaps and challenges that need immediate attention in the process of developing sufficient and responsive laws and policies that will actualize the devolved system of governance and the country's economic blue print, Vision 2030.

I wish to take this opportunity to sincerely thank the members of the team for their meritorious and sincere effort in writing this enlightening Report. My heartfelt gratitude also goes to the stakeholders and sector experts for their tireless efforts and enriching contribution and co-operation which led to the successful completion of the Report.

P. Kihara Kariuki

Attorney-General

Foreword by Chairperson, Kenya Law Reform Commission



Devolution is one of the hallmarks of the Constitution of Kenya, 2010. Devolution has not only improved the economic and social welfare of people in many places, (some of which were traditionally marginalised), but has, to a great extent, increased the democratic space in our country, since the people are now part of the decision-making processes. As a country, we have indeed overcome several challenges and milestones in a bid to make the devolution dream a reality.

The Kenya Law Reform Commission (KLRC) is established by the Kenya Law Reform Commission Act, No. 19 of 2013 and is mandated to keep under review all the law and recommend its reform by undertaking research and comparative studies relating to law reform as well as related legislative impact assessments. The Commission also provides advice, technical assistance and information to the national and county governments with regard to the reform or amendment of any branch of law. The execution of this mandate includes undertaking a detailed audit of all the existing pieces of legislation, policies and administrative procedures and harmonizing them with the Constitution.

The Council of Governors (CoG) conducted a baseline survey which revealed that most of the laws in respect of key devolved functions were largely not compliant with the Constitution of Kenya, and key devolution Articles including Articles 173, 174 and the Fourth Schedule to the Constitution which demarcates the functions to be undertaken by the national and county governments. As a consequence of the survey findings, the Commission in partnership with COG undertook an audit of the national and county policies and law across seven devolved sectors. The purpose of the audit was to analyse national and county policies and legislation to determine their compliance with the Constitution with particular reference to devolution.

The Audit Report is one among the initiatives that we hope will help policymakers and relevant institutions in their efforts to entrench devolution. The Report focuses on seven devolved sectors namely: Health, Public Finance Management, Agriculture, Trade and Investments, Land and Physical Planning, Urban Development and Natural Resource Management as provided in the Fourth Schedule to the Constitution.

The Report documents the findings of the audit process in the identified seven sectors. It provides an analysis of the national and county policies and legislation and identifies the gaps and challenges with these instruments of governance. It further outlines recommendations for harmonization and alignment which will inform the success of counties in implementing devolution and will ensure the achievement of the collective aspirations of Kenyans, given the critical role of devolution in our current dispensation. The publication of this Report is a culmination of a highly participatory and consultative process in line with the constitutional requirements of public and stakeholder participation and engagement.

Through this Report, the Commission and CoG will spearhead and undertake the proposed policy and legislative reforms in partnership with the relevant sector Ministries, Departments and Agencies (MDAs). The successful implementation of the Report therefore calls for a coherent and cross-sectoral approach and a coordinated response across all levels of government, private sector and other non-state actors. Towards this end, all MDAs at both levels of government are expected to work closely together to make the proposed recommendations a reality. Finally, in publishing this Report, the Commission and CoG reaffirm their unwavering commitment and support to ensure conformity with the Constitution and respect for devolution.

I would like to thank all those who contributed to the development of the Report and subsequent finalization in one way or the other.

Thank you very much.

Mbage Ng'ang'a

Chairman KLRC





Acknowledgements

The development and finalization of this Report benefited from the contribution of various institutions and individuals. Various stakeholders including Ministries, Departments and Agencies (MDAs) at both levels of Government, the Private Sector, Non-State Actors, Parliament and the Office of the Attorney-General were consulted and their views considered. The stakeholders interacted with the Draft Report and gave their practical position on the issues raised. We sincerely thank them all for their invaluable contribution.

The audit process that culminated into development and publication of this Report was made possible through the generous financial support of the United States International Development (USAID) through the Agile and Harmonized Assistance to devolved Institutions (AHADI) and the Danish International Development Agency (DANIDA) through the International Development Law Organization (IDLO), the United Nations Development Programme and the World Bank. We are forever grateful to Ms. Waceke Wachira, USAID-AHADI Chief of Party and Mr. Romualdo Mavedzenge, IDLO Kenya Country Director, and their respective committed teams for their patience especially during those times when processes slowed down.

We acknowledge the excellent work done by the core technical committee comprising Ms. Joan Onyango (KLRC), Ms. Rosemary Njaramba (CoG), Ms. Zipporah Muthama (CoG), Mr. Justice Gatuyu (KLRC), Ms. Mukami Kibaara (CoG) and Ms. Christabel Wekesa (KLRC) which laid the foundation for the development of this Report. The Technical Committee incorporated the Office of the Attorney General & Department of Justice, Senate, IGRTC and Ministry of Devolution and ASALs whose input we sincerely appreciate. It is through their enthusiasm, hard work and commitment that we credit the accomplishment of this mission. We especially thank the staff of KLRC and COG (the joint secretariat of the Technical Committee) for their dedication and tireless efforts in ensuring successful completion of this Report. Special mention must go to the KLRC Chairman, Mr. Mbage Ng'ang'a who at various points was personally involved in the audit process.

We commend Dr. Conrad Bosire and the team of sector consultants namely: Prof. Kameri Mbote, Dr. Collins Odote, Mr. Peter Wanyama, Mr. Gabriel Ndung'u, Ms. Catherine Mumma, Ms. Rhoda Njuguna, Mr. Peter Mwangi, CPA Paul Otsola, Mr. Victor Odhiambo and Dr. Wilson Songa, for the exhaustive research in the policy and legal frameworks. They worked tirelessly with the technical committee to constantly revise, edit and improve the contents of this publication. It is through this effort that we have this comprehensive Report.

Finally, we are indebted to the people of Kenya for according us the opportunity to serve and being the reason we continue to evaluate ourselves as a Country.

Thank you!

Ms. Jacqueline Mogeni, MBS
CEO, Council of Governors

Mr. Joash Dache, MBS
CEO/Secretary, KLRC

Council of County Governors

The Council of Governors (CoG) is a non-partisan organisation established under Section 19 of the Intergovernmental Relations Act (IGRA 2012). The Council of Governors comprises of the Governors of the forty-seven Counties. Main functions are the promotion of visionary leadership; sharing of best practices and; offer a collective voice on policy issues; promote inter-county consultations; encourage and initiate information sharing on the performance of county governments with regard to the execution of their functions; collective consultation on matters of interest to county governments.

CoG provides a mechanism for consultation amongst county governments, share information on performance of the counties in execution of their functions, facilitate capacity building for Governors, and consider reports from other intergovernmental forums on national and county interests amongst other functions. The vision of the Council of Governors is to have prosperous and democratic counties delivering services to every Kenyan.

Kenya Law Reform Commission

The Kenya Law Reform Commission (the Commission) is established by the Kenya Law Reform Commission Act, No. 19 of 2013 (the Act). Presidential assent was given on 14 January 2013 and the Act came into force on 25th January 2013. The Commission has a statutory and ongoing role of reviewing all the law of Kenya to ensure that it is modernized, relevant and harmonized with the Constitution of Kenya. Following the promulgation of the Constitution in 2010, the Commission has an additional mandate of preparing new legislation to give effect to the Constitution. The third mandate is found in the County Governments Act, No. 17 of 2012 which requires the Commission to assist the county governments in the development of their laws. This is also a requirement found in the Act.

The Act grants the Commission a body corporate status and the necessary autonomy to enable it discharge its mandate as envisaged under the Act. The Commission is wholly funded by the Government but welcomes support from its partners.

Before the enactment of the Act, the Commission operated as a Department within the Office of the Attorney-General before being moved administratively to the Ministry of Justice, National Cohesion and Constitutional Affairs in 2003.

Executive Summary

Introduction

The Council of Governors (CoG) and the Kenya Law Review Commission (KLRC) commissioned a study of law and policies across seven sectors with three main objectives:

- » To conduct an audit of County policies and legislation with a view to analysing their compliance with the Constitution;
- » To conduct an audit of all National policy and legislation with a view to examining to what extent they conform to the devolved system of governance; and
- » To identify the gaps and challenges in the above and propose remedies available for harmonization and alignment.

The seven sectors that were chosen for analysis are:

- » Health
- » Public Finance Management
- » Agriculture
- » Trade and Investments
- » Land and Physical Planning
- » Urban Development
- » Natural Resource Management

This report presents the findings from the seven sectors.

Methodology and approach to the Audit

First, the basis or anchor upon which the analysis was carried out is the Constitution of Kenya 2010. The thrust of the Constitution of Kenya 2010 was to disperse economic and political power from the centre to 47 county governments across the country. The constitutional framework upon which this dispersal is based formed the basis of analysis of the 7 sectors. The Constitution distributes responsibilities between the two levels of governments through the Fourth Schedule to the Constitution. The Constitution provided for a two phases of transition (2010-2013 and 2013-2015), to enable alignment of systems of to the two-tiered system of governance. The constitutional framework calls for a consultation and cooperation in the performance of functions between the two levels of government. To reify this constitutional framework, primary legislation, such as, the County Government Act and the Intergovernmental Relations Act were put in place to guide implementation of devolution. The constitutional, legal, and policy frameworks provided an anchor upon which the sectoral analyses were carried out. The main objective was to consider the extent of compliance with the laid down constitutional framework.

Secondly, using the normative (constitutional and legislative) yardstick above, the sectoral audit entailed a review of documentation (mainly legislation and policy documents) in the identified sectors. Accordingly, content analysis was carried out for laws, policies, administrative guidelines, sectoral plans, and cases that have come before court on various relevant matters. The products of this stage of the study were sectoral reports whose content was based on the review of documentation.

Thirdly, the initial drafts of the sectoral report were subjected to a peer review process, which involved sector experts. The peer reviewers provided a quality assurance check on the reports and provided feedback on gaps and areas for further research.

Finally, the study entailed involvement of stakeholders in the review of the initial reports based on inputs of stakeholders. Regional hearings were held to discuss the sectoral reports and one national stakeholders' forum to validate the sectoral reports. Participants at the stakeholders' forums included: national and county government officials from the respective sectors, civil society organisations, and representatives of community based organisations and networks that deal with sectoral governance issues.

Findings:

General Trends

- » **Ambiguities in the constitutional framework** need to be addressed in order to facilitate the development of coherent laws and policies across the sectors. While the Constitution provided for two transition phases (from 2010 to 2013 and 2013 to 2015) for unbundling and clarifying government competencies at the two levels, this goal was not achieved.
- » There is a **persistence of the old order** (laws, policies, and practices) across all the sectors reviewed. In all the sectors, the majority of the laws applicable pre-date the current Constitution and this means that the new roles of the county governments have not been taken into account in the text of these laws and policies.
- » There is space for clarification of the ambiguities above through consultation and cooperation between the two levels of government. However, another major finding is that there is **inadequate consultation and cooperation** between the two levels of government that can support and facilitate a holistic development of laws and policies at both levels of government. While formal structures exist, some of which are provided for by law and existing policies, they have not been used to clear the challenges of development of laws and policies for both levels.
- » In some instances, laws that are passed at the national level contradict each other and this reveals low levels of coordination, even among players within the same level of government. A glaring example of this is the contradictory and confusing provisions in the laws relating to land (see Chapter 5). A more effective mechanism of cooperation between the sectors and the levels of government can contribute to more harmonious legislation and policies.
- » Finally, the audit review reveals a dearth of capacity at both levels of government to facilitate the effective development of laws and policies that are clear, coherent, comprehensive and compliant with the applicable constitutional provisions. Accordingly, a major recommendation from this report is the systematic growing of capacity of national government sectoral bodies and the county departments to enhance the capacity to develop laws and policies that can actually facilitate the pursuit of the respective mandates without some of the challenges highlighted above.

Specific (sectoral) Trends, Findings, and Recommendations

Some of the specific findings from the sectoral analyses are pinpointed below.

Health

- » **All** the national laws and regulation relating to health should be urgently reviewed to align them to the Constitution. This will assist in facilitating better understanding and compliance by national and county staff with the devolved system of governance.
- » County governments need to put in place county implementation frameworks (County policies, laws, regulations, guidelines) for the health sector which will better guide county staff to deliver improved health services to the citizens. Specifically, county executives need

support with Legislative Drafting to enable them come up with sufficient and responsive Bills to actualize devolution .

- » The ongoing reviews of the **Health Act** should be carried out simultaneously with that of the **Public Health Act** with a view to repealing the **Public Health Act** and including its provisions in the **Health Act**.
- » There should be a harmonization of laws, policies, and regulations in order to ensure that fees and other charges paid for licensing/ regulating health facilities are not excessive. E.g. Amendments to the Kenya Medical Practitioners and Dentist Board regulations require counties to pay fees annually.
- » Any amendment bill on any of the reviewed laws that may be pending before parliament (e.g. the Miscellaneous Amendment Bills) should be reviewed to incorporate the recommendations of this audit and then subjected to public participation in line with the constitution.
- » The laws and legal notices establishing parastatals in the health sector should be reviewed and relevant inter-governmental consultations held on how the institutions with mandates that include county functions can be re-structured if they are not wound up.
- » The laws affecting the licencing and registration of health personnel need to be clarified to indicate the role of county governments in regard to health professionals noting that the regulation of professionals is a national government function while counties are employers of professionals and providers of licences to facilities that provide county health services. Furthermore, regulatory services should be decentralized in order to ensure effective supervision of health service provision across the country.
- » Now that the constitution contemplates the implementation of provision of ratified international treaties, it will be important for the drafters of laws at the national and county levels to factor these provisions in the laws.

Public Finance Management

- » A review of sector laws and policies should address the issue of the budget cycle during election years. Given that elections are held in August, it is necessary that the budget cycle begins earlier in the preceding financial year so as to ensure that the budget is passed before the August election.
- » Laws and policies should be revised to provide for a clearer and more certain process of public participation in the management of public finances
- » There is a need for certainty in the schedule of disbursements to counties. Delays in the disbursements occasion disruption of services and salary delays in counties
- » There should be a remedy to counties where there is a delay in the passing of the County Allocation of Revenue Act (CARA). It is suggested that counties should be allowed to access up to 50 percent of allocations where there is undue delay in finalising the CARA
- » Counties should develop regulations and measures to ensure adherence to county budget estimates and ceilings in actual county expenditure. There should be adherence to the County Fiscal Strategy Paper (CFSP) and the County Medium Term Plan (MTP)
- » The law should be amended to provide more time for the counties to digest the Budget Policy Statement as this is critical to the planning and budgeting for county resources
- » The proposed law on the Ward Development Fund should provide for a bottom-up planning and utilisation of the fund in order to make it a truly grassroot fund. The level or amount of fund should also be rationalised vis-à-vis the mainstream funding from the county governments.

Agriculture

- » While a number of laws have been repealed in the sector, a majority of the relevant legislation to the sector require an overhaul for compliance with the Constitution.
- » The Ministry in-charge of Agriculture has many institutions whose mandate overlaps with county governments. The recommendations of the 2013 Parastatal Taskforce should be reviewed and applied to the agricultural sector in order to restructure and rationalise the roles played by the numerous Semi-Autonomous and Autonomous Government Agencies in the Sector (SAGAs) in the sector.
- » Furthermore, there is a need to relook, in a holistic manner, the functions performed by the SAGAs vis-à-vis the role of counties in the Constitution. The Agriculture Sector is one of the sector whose functions are mainly devolved and performed at the county level and this should be reflected in the policy, legal and institutional arrangements of the sector.
- » Development of sector policies provides a space and opportunity for negotiating functional boundaries for concurrent function if any and achieving coherence in the sector. A number of policies have been proposed and these should be developed on the basis of consultation and cooperation.
- » It is important that all laws and policies are developed on the basis of Vision 2030, the country's economic blueprint as well be alive to devolution. This is especially important for agriculture, which is the country's largest economic sector.

Trade and Investments

- » The Trade Sector lacks a legislation that guides the development and growth of the sector with a view of bringing together all related trade legislations at the National level to central body that coordinates the implementation of the Trade Policy.
- » It is recommended that all the parastatal institutions established under Legal Notices (eg. Kenya Accreditation Service (KENAS) and Export Promotion Council (EPC) should be reviewed and be established under Acts of Parliament.
- » The Public Private Partnership Act, 2012 should be reviewed to ensure make it easier for both National and County Governments to finance huge infrastructural development projects.
- » Any Amendment Bill on any of the reviewed laws that are pending before Parliament (eg. Micro and Small Enterprises) Bill, (Senate bill No. 12 of 2015) should be reviewed to incorporate the recommendations of this audit and then subjected to public participation.
- » A number of key National legislation (eg. Special Economic Zones Act, 2015 and Export Processing Zones Act, Cap. 517) the responsible National Government agencies should work with County Governments to review the legislations in a view of providing the roles of each level of Government.
- » The majority of the National legislation do not cater for County Government representation in the Boards and Committee structures yet the legislation cover important trade and investment issues affecting Counties.
- » Any National Policies pending (eg. National Investment Policy) should be reviewed conform to the CoK, 2010 and then subjected to public participation.

Land and Physical Planning

- The Physical Planning Act requires a fundamental review in order to reflect the extensive post-2010 changes.

- » The Physical Planning Bill does not adequately reflect the changes brought by the current Constitution.
- » The Community Land Act does not reflect the roles of the county governments and the National Land Commission, yet these bodies have substantive roles to play in the administration of community lands.
- » Address the inconsistencies and contradictory provisions in the Land Registration Act, Community Land Act and the Land Adjudication Act

Urban Development

- » The National Land Policy (2009) should be reviewed to provide for the role of the National Land Commission and county government in urban land use planning and policy.
- » The National Urban Development Policy 2016 should be reviewed to incorporate provisions of Article 67 of the Constitution (the role of the National Land Commission). The policy should also have the input of the county governments .
- » The National Housing Policy should be reviewed to include devolution arrangements and specifically recognise the role of counties in substantive areas of policy implementation. Specific areas include: slums and informal settlements, rural housing, land use planning and management, estate management and maintenance, etc.
- » Similarly, the National Slum Upgrading and Prevention Policy should include the role of counties in ensuring proper human settlements and housing.
- » The National Spatial Plan (2015 – 2045) should be revised to incorporate constitutional arrangements regarding urban planning and development, especially as they relate to county governments and the role of the National Land Commission.
- » The Urban Areas and Cities Act should be reviewed to provide more clearly on the roles and limits of National Government, county government entities, and the National Land Commission on issues of urban planning and development.
- » The Urban Areas and Cities Act should provide for and facilitate, a in a clearer manner, inter-county planning and financial services.
- » The Physical Planning Act (PPA) of 1996 should be overhauled to take into account the existing governance arrangements and post-2010 regimes for physical planning .

Natural Resource Management

Forests: Forest Conservation and Management Act 2016

In the Forestry Sub-sector, the laws and policies should recognise the central role that counties play in conserving forests. The counties play an important role in the implementation of national policies and legislation and the legal framework governing this sub-sector should take the role of counties into consideration in the following areas:

- » **Benefit Sharing:** clear mechanism for benefit sharing of forest resources with the counties and the community.
- » **Charcoal:** Framework for sustainable charcoal regulation and alternative energy sources and livelihood mechanism.
- » **Chain of custody:** Develop a chain of custody for forest products from the community and private lands.
- » **Participation of counties in management of public forest:** Need for a framework of engaging Counties and communities in management of public forests.

Mining: Mining Act 2018

The Mining Act should be reviewed to provide for cooperation and consultation between the national government and county governments. Currently the 2016 Act provides for control rather than cooperation.

The land management aspects of mining should reflect the role of counties, especially in unregistered community lands. This is not given any recognition or treatment in the Act

- » There is a narrow Interpretation of the Article 62(1) (F) provides that minerals are vested in the national government. The Mining Act interpretation of this clause does not appreciate the fact that county governments and communities are critical stakeholders that have to buy in to a mining proposal. This narrow interpretation can be blamed for the short timelines provided to county governments and communities to object to the issuance of a mineral rights (license).
- » as well as a legislative framework that is biased towards large scale mining – to the detriment of counties and communities.
- » This has affected transparency and accountability of the provisions and institutions in the act. It has neglected artisanal and small-scale mining which have the potential of becoming large revenue sources for counties.
- » This neglect may result in serious environmental, health and safety concerns to citizen caused by concentrated artisanal mining which is poorly regulated.
- » Local content provisions in the act are investor driven and are not linked to development and capacity building plans of the counties.
- » The act suffers from an incomplete revenue management infrastructure and unclear fiscal regime.
- » Finally, counties not adequately engaged in regulation development and review. A lacuna was identified in the post legislative scrutiny mandate of the committee on delegated legislation in the National Parliament (National Assembly and Senate).
- » The mining act was developed without an approved policy to guide the sector. The policy has yet to be approved by the National Parliament which means this review was not based on a known policy baseline. To assist this process and ensure that international best practice inform the development of a financially beneficial and environmental sustainable extractive sector county governments must lobby National Government to develop and Parliament to approve an extractive sector policy that would guide extractive law which includes Mining.

Environment: The National Environmental Policy 2013 and EMCA 2015

The National Environmental Policy 2013 should be revised to incorporate the role of county governments in implementing national policies and standards as spelt out under Part 2 of the Fourth Schedule to the Constitution

- » Specific areas of involvement of county governments include:
 - Human settlements
 - Management of biodiversity
 - Energy use
 - o Efficiency and conservation
 - o Air quality

- o Noise control
- o Water and sanitation
- » EMCA to ensure effective engagement of counties in the review, supervision, monitoring and auditing of EIAs; and
- » Criteria should be provided in selection of County Environment Committee
- » EMCA is not clear on who facilitates the Committee
- » The Role of the County Environment Committee should be clear
- » The law should be clear on social safeguards

Water: Water Act 2016

The Water Act 2016 does not provide clearly for the division and alignment of functions between the national government and the county governments. The Act should be revised to incorporate the principles of devolution, clarify the relations between counties and water sector institutions, and the two levels of government. Specific issues/ roles of counties that should be clarified include: sanitation and water services, water resources management, etc.

- » The Establishment of the Water Sector Trust fund is procedural given all water funding should be channelled through the constitutional structures such as annual funding and equalisation funds.
- » Water Works Development Agencies and National Water Harvesting and Storage Authority would be taking over powers of the county governments to develop water works and infrastructure to deliver water and sanitation services, a function constitutionally assigned to the county governments. This includes the design, borrowing for financing and implementation of water works development. Secondly, county governments argue that the agencies proposed undermine the ability of county governments to establish cross county waterworks or projects through joint committees or authorities established by the counties. Article 189 (2) of the Constitution empowers counties to establish joint committees or authority to implement projects that are cross county in nature.
- » There is no representation of Counties Governments in the Water Service Regulatory Board(WASREB) although there is room for the regulatory board to work with the county governments in enforcing certain regulatory requirements including terms of service provision.
- » Water Resource Authority(WRA) being an agent of the National Government cannot coordinate the County Government this will take the powers of the county government in management of water resources, there is also no representation of the County Government on the WRA Board.
- » The Kenya Water Institute Act of 2001 should be revised to incorporate the water sector governance arrangements and specifically the role of counties .



1

INTRODUCTION

1.1 Background

The Constitution of Kenya, which was adopted in August 2010, introduced fundamental reforms to state and governance structures. At the core of this radical and fundamental restructuring is the devolved system of government, which comprises of the national government and 47 county governments that are established across the country. To each of these 47 devolved units, legislative and executive powers were devolved and vested in elected arms of government comprising the county assembly and the county executive. Indeed, Kenya's devolution has been termed as the most important post-World War II change in devolved governance after post-Franco reforms in Spain, and post-Apartheid South Africa.

In order to make concrete this two-level system of government, the Constitution guarantees resources, powers, and functions for the county governments. The Constitution provides for minimum revenue (15 percent of revenue collected nationally) to be provided to counties and lists functional areas, which county governments can exercise powers over. County governments are currently in their second term, after the August 2017 general election having gone through the first term from March 2013 to August 2017.

The objectives and purposes of devolved government are clearly set out in the 2010 Constitution. The 47 county governments are required to use their powers and resources to pursue development priorities of communities across the country. Furthermore, county governments are required to pursue development in accordance with democratically agreed priorities at the county level. The powers and resources devolved to counties are expected to facilitate national unity through recognition of local diversity. County government resources and powers have a potential to ensure socio-economic and political inclusion and thereby contribute to the consolidation of national unity. This extends to protection of minorities and marginalised communities in the counties. Finally, county governments are expected to pursue and ensure the democratic check and separation of powers to ensure accountability.

However, Kenya is emerging from a strongly centralised and unitary system of government, which as inherited from the colonial era. While there was a brief attempt (at independence) to introduce a regional system of government, commonly referred to as majimbo, the system did not last long and was dismantled shortly after its introduction. Kenya's governance structures have, therefore, always been centralised with no real devolution or sharing of powers between the centre and sub-national units.

Accordingly, the Constitution and enabling legislation provided for two phases of transition in order to put in place laws, policies, institutions, and systems to facilitate the effective implementation of devolution. The first phase commenced immediately after the promulgation of the Constitution in 2010, and lasted until March 2013 when the pioneer county governments came into place. The second phase commenced after the entry of the first county governments and lasted for three years, until March 2015. During this period, county governments (and institutions responsible

for implementing devolution) were expected to put in place essential systems to enable county governments to perform their functions.

The transition period provided an important opportunity to align governance structures and facilitate the full implementation of devolution. For instance, while the powers and functions of county governments are given through a scheme division of functions in the Fourth Schedule to the Constitution. There is a need for even a basic clarity of the nature and extent of national and county government responsibilities. There are two lists of functions in the Fourth Schedule: one for the national government, and the second for the county government. However, the Constitution also provides that functions that do not appear in any of the lists belong to the national government. Furthermore, the Constitution provides that functions that appear on both lists are concurrent and can be exercised by either level of government, subject to criteria provided under Article 191 of the Constitution.

First, the transition period was expected to provide clarity on the full extent of responsibilities as provided for in the general and vague scheme that is under the Fourth Schedule. Secondly, the two transition phases provided an opportunity to build the capacity of both levels of government to ensure the effective of handling of their respective mandates. Thirdly, the transition phase provided space for the re-alignment of institutions at both levels of government to reflect the new constitutional scheme of governance.

An important part of this restructuring is the policy and laws of both levels of government. Ideally, at the end of the second phase of transition, we should have had in place a comprehensive system of laws and policies that facilitate the constitutional mandate of both levels of government. However, as the subsequent chapters of this report demonstrate, challenges still abound. The report points to incompleteness of the transition as regards laws and policies across the different sectors examined. The seven sectors examined are: health, public finance, trade and investments, land and planning, urban development, and natural resource management.

1.2 Transition to County governance

The transition provisions in the Constitution put in place a number of measures to ensure a smooth transition to county governments. First, the Fifth Schedule to the Constitution provided a schedule of legislation that was to be enacted before the March 2013 election. These included laws on devolution and public finance. Secondly, the Constitution provided for the establishment of independent institutions to shepherd the implementation of devolution. The Transition Authority was established by enabling legislation.¹ The Constitution established the Commission for the Implementation of the Constitution (CIC) with a 5-year mandate (which commenced in January 2011) of overseeing the implementation of the Constitution, including laws and policies, for the first five years.

The TA's role was crucial; the body was tasked with clarifying national and county responsibilities², costing the functions,³ and building the capacity of national and county governments to undertake their responsibilities. The CIC, on the other hand, was tasked with vetting proposed legislation and policies to ensure compliance with the current constitutional dispensation.

However, at the end of the first transition phase, a number of laws and policies were not yet in place. Ideally, it was expected that the TA would have unbundled the Fourth Schedule and clarified the nature and extent of responsibilities for the two levels of government. In turn, this

1 Transition to Devolved Government Act (2012).

2 Section 7 (2) Transition to Devolved Government Act (2012).

3 Section 7 (2) (b).

would have laid a clear basis for legislative and policy frameworks at both levels of government, especially at the entry point of county governments.

While the laws on devolution that were specified in the Fifth Schedule were all enacted, the list did not contain all essential laws to facilitate county operations. Indeed, a number of laws, which are critical for sectoral operations were not included in the schedule or calendar of laws that were to be passed under the 5th schedule to the Constitution. Thus, county governments commenced operations in the various sectors without a clear and coherent national legal and policy framework.

The second phase of transition to devolution ended with the exit of the Transition Authority in March 2015, three years after the March 2013 general election. The objective of the second phase was to ensure that county governments have essential systems (including laws and policies) in place, to ensure service delivery and pursuit of devolution objectives. However, at the end of the second phase of transition, a number of issues (including laws and policies) remained unresolved.

First, the TA did not complete the process of unbundling powers and functions of the national and county governments, a fact that was acknowledged in the TA's exit report.⁴ In its June 2015 report, the TA noted the "slow review/ realignment of laws touching on devolved functions" and specifically "developing of a framework for to guide the analysis and performance of concurrent functions" as an outstanding issues as at the end of the term of the TA.⁵

The process of functional assignment is an important one as it offers a guiding framework for functions and powers for the two levels of Government. In terms of policy and legislative analysis, functional assists in:

- » The process of developing of policies and laws by the county governments that support implementation of their functions (devolved functions);
- » Reviewing of the constitutional conformity of existing laws within the national government;
- » Assessment of the policies and laws developed by the county government in regard to constitutional conformity and compliance with the devolved system of government; and
- » Identification of policy and legislative gaps that exists especially within county governments in the functional areas within their jurisdiction.

Accordingly, functional assignment and the corresponding legislative and executive powers forms a conceptual basis for determining constitutional compliance of policies and laws at the two levels of government. Moreover, this too facilitates to identify areas within the agricultural sector where county government have legislative and executive powers, but they are yet to engage in the process of policy formulation and enacting of the requisite legislation for devolved functions. Likewise, the framework supports the review of the exercise of executive powers in administering services as well as implementing laws; county laws or national government laws where there is a requirement of their implementation by the county governments.

While the TA transferred certain functions to counties via three gazette notices, components of the functions transferred were not clear and this still created a problem of ambiguity. An assessment of implementation of county functions, by the Commission for the Implementation of the Constitution (CIC) in August 2015, noted this particular issue. The CIC report observed that certain functions were "not being implemented by county governments because of lack of clarity"; the reported cited examples of betting control and licensing.⁶

4 Transition Authority, The Status of Transition to Devolved Government, 2014, at p.27

5 As above.

6 Commission for the Implementation of the Constitution, End Term Report, 122.

Accordingly, at the end of the final phase of transition, a lot of issues regarding realignment of laws and policies were left pending. Pending functions of the TA, at the end of its term, were transferred to the Intergovernmental Technical Relations Committee (IGRTC) as was provided for under section 12 (b) of the Intergovernmental Relations Act.

During this period, the Council of Governors undertook the first legal and policy audit of laws and policies in order to ascertain their compliance with the Constitution.⁷ In the first audit report, which was completed in April 2015, the CoG identified a number of gaps across 10 sub-sectors that were examined during the study:

- » Agriculture
- » Water and sanitation
- » Arid and Semi Arid Areas
- » Roads
- » Public Finance, Commerce, and Economic Affairs
- » Environment and Natural Resources Sector
- » Land and Urban Development
- » Education and Information Communications and Technology (ICT)
- » Health
- » Trade, Commerce and Investments.

In each of these sectors proposed and existing laws and policies were examined and sector-based recommendations proffered. Among the main concerns that ran across the sectors was the lack of adequate consultation between the national and county governments in the development of laws and policies of mutual concern. The institutional arrangement for collaboration and cooperation is weak or totally lacking and this created a disjointed policy-making process. The main proposal in the audit was the development of comprehensive sector plans that incorporate the views of both levels of government with regard to performance of functions, sharing of resources and responsibilities, and overall sector coordination and performance.⁸

1.3 Post-transition Phase: same challenges?

There is marked and substantial progress from the transition phase to the current phase (second term of county governments). Counties have developed and passed a number of laws and policies in various sectors. This is as a result of various capacity building measures that have led to the generally increased capacity of counties to develop laws and policies. Across the sectors examined, we have two broad categories of laws. First, there are laws that were passed before the promulgation of the current Constitution in August 2010. As the subsequent chapters will demonstrate, a bulk of the legislation examined in the seven sub-sectors precedes the current Constitution. While the Constitution provides that pre-2010 laws should be interpreted and applied in a manner that fits within the current constitutional dispensation,⁹ the fact that there are no express provisions that apply to the current set-up and the prevailing constitutional ambiguities have rendered this provision inoperative.

Secondly, there are laws that were passed after the promulgation of the Constitution. Within this second category, there are two further sub-categories of legislation. The first is laws that, although passed in post-2010, they were passed before the pioneer county governments came into place. Accordingly, the counties did not manage to make an input at the development stage

7 Council of Governors, 'Sectoral Policy and Legislative Analysis' (April 2015)

8 Council of Governors, 'Sectoral Policy and Legislative Analysis' (April 2015) p. 9.

9 Section 7, Fifth Schedule Constitution of Kenya 2010.

of these laws. Predictably, many of these laws have provisions that infringe on the powers and functions of county governments. The second sub-category is that of laws that were developed with the active participation of the county governments. While many of these laws have taken into account areas of shared jurisdiction between the two levels, there are a number that still have glaring gaps in terms of functional boundaries between the two levels of government.

The national government plays an important role in shaping policies in sectors. However, the development of policies is yet to be fully consultative. There are no proper structures for intergovernmental consultation in the development of policies by the national executive. Furthermore, there is no concrete avenue (except during public participation) through which counties are able to make their input in the development of national legislation. The end result is that, in some cases, we end up with national laws and policies that do not the constitutional threshold.

There are a number of laws and policies that require revision in order to align with the constitution. With regard to policies there are a number of policy documents that require revision, update, or a wholesome revision and introduction of new policies.

1.4 Cross-sectoral issues in Policy and Legislation

The Constitution of Kenya 2010 has impacted Kenya's legal and policy process in a substantial manner. First, under the previous dispensation, policy-making and law making was a centralised affair where the national executive and the unicameral legislature exercised exclusive powers over laws and policies. However, the Constitution has now carved out law and policy-making powers for the county level. However, this separation of responsibility stands alongside common constitutional goals and objectives that must be pursued harmoniously by the two levels of government. For instance, the principles and values enunciated under Article 10 of the Constitution bind all state institutions including the two levels of government. Furthermore, objectives and principles of devolved government that are listed under Articles 174 and 175 bind both levels of government.

These broad provisions translate to a need for a common and harmonious way of developing laws and policies that are applicable to the national and county levels respectively. Vision 2030 is the country's economic, social and political blueprint. It outlines the steps that the country intends to take in order to reach the desired level of economic, social and political development by the year 2030. Accordingly, the import of Vision 2030 is to lay a common basis for national and county policies and laws. The two levels of government are expected to (re)align their activities, development plans, and general governance processes towards realisation of the specific targets that have been put identified in Vision 2030. The overall goal of Vision 2030 is to make Kenya a newly industrialised country "middle income country providing high quality of life for all its citizens by the year 2030".¹⁰ The broad vision is broken down into three important components: the economic, social and political pillars that will lead to the achievement of the overall vision.

The objectives of devolved government clearly demonstrate that county governments play a central role with regard to the economic, social, and political development. Indeed, county governments are seen as important vehicles through which local development and delivery of essential services will be channelled. Ideally, the policy and law development process at both levels of government should have in place a coordination process where all plans, laws, and policies are aligned to Vision 2030.

Furthermore, the ideal position is that policies should inform the development of laws at both levels of government. In this regard, the National Government has a broad policy-making power.

¹⁰ Republic of Kenya 'Vision 2030' (2007) 1.

Accordingly, national policies and laws should provide a broad legal and policy framework for the development of county laws and policies. However, this has not always been the case. In many cases observed in the subsequent chapters, laws have been developed without the attendant policies at both levels of government. In other cases, policies and laws are developed without adequate consultation between the two levels of government. These issues happen across the sectors and the main challenges, which seem to appear across all the sectors, are briefly highlighted below.

Ambiguities in Implementation

Due to the incomplete transition highlighted above, national and county governments continue to perform functions without a clear division of responsibilities as envisaged in the Constitution. The area of concurrent functions (which can be performed by either level) for instance poses a challenge due to the uncertainty of the extent of responsibilities for counties in the shared areas.

Thus, there is confusion in national and county legislation and policy. There is a need for continuation and completion of the unbundling process in order to have clarity, as this will inform law and policy development across board. This can only be achieved through strengthened collaboration between the policy-making organs at the national and county levels.

While courts have stepped in and made pronouncements in cases or through advisories, the nature of court cases is that they do not engage in policy matters or make broad-based policies. Indeed, even where county governments have been vested certain functions through judicial determination, there is a need for broad-based policies and laws to facilitate sectoral coordination. Court cases are neither a comprehensive nor systematic ways of aligning policies and laws as this is best done through a collaborative approach by law and policy-making organs at both levels.

Inadequate consultation and cooperation

The Constitution places cooperation and consultation at the centre of the current constitutional dispensation. The only way that the two levels of government (with separate powers and resources) can pursue common constitutional objectives is through collaboration. The importance of this aspect is recognised under Article 6 (2) of the Constitution and given more substance under Article 189 of the Constitution. Counties are partners with the national government in the determination of functional boundaries. As such, the two levels of government should work closely in negotiating legal and policy frameworks.

In many of the main sectors, there are intergovernmental committees that are composed of the cabinet secretaries and the respective county executive committee members. There are many instances that county governments participate through these structures and give their inputs to laws. However, the input of counties is, in many instances, not taken when laws are finalised in Parliament. As a result, many national laws and policies are passed in a near unilateral manner. Yet, the Constitution is clear that both levels of government should consult on areas of mutual interest. The failure to give a practical effect to the concept of cooperation and consultation has affected the development of laws and policies.

Incomplete Transition and the persistence of the Pre-2010 Order

There are a number of laws and policies from the old order persist and continue in a number of sectors. The fundamental changes introduced by the Constitution require a policy, legal, and institutional restructuring in order to fit with the current constitutional precepts.

In many of the sectors, notably Agriculture, Health, Physical Planning, Trade and Investments, there are old laws that have not been revised to facilitate or reflect the new roles that county governments are playing in those sectors. In most of these cases, there has been no impetus

to revise the old laws and the persistence of the old order is evidenced by a number of laws with provisions that are unconstitutional. One of the major recommendations from this report is to have a specific review of all laws and policies in the identified sectors in order to ensure compliance with the current system of devolved governance.

Capacity

While there is growing capacity in counties, there is a constant and consistent need for capacity to match up the constitutional mandate that has been given to counties. Counties have a primary mandate to develop laws and policies to cover all areas allocated to them under the Constitution. While a number of laws have been developed, there is a mismatch between the legal and policy needs and the number of laws and policies currently in force in the counties.

Finally, laws and policies are only as useful as the matching capacities to ensure that counties are able to utilise laws and policies in order to provide concrete services and perform other functions. This calls for a holistic review of the capacity requirements of counties in order to ensure that once good laws and policies are development, they actually facilitate the achievement of the intended benefits to county governments.

2

HEALTH

2.1 Introduction

The devolved system of government substantially altered the structures and institutional arrangements for the provision of health services in the country. The Fourth Schedule, which allocates responsibilities between the two levels of government, vested the county governments with a core role of providing basic health services while national health policies, standard setting, technical support for capacity needs and national level health services (referred to as national health referral services) were retained at the national level. Prior to 2010, the local authorities played a dismal role in public health services with only 3 to 4 larger municipalities (out of the 175 former local authorities) offering some basic health services.

More importantly, the Constitution recognised, for the first time in Kenya’s constitutional history, the fundamental right to health. Article 43 (1) provides that “every person has a right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care”. Along with the right to health, the Constitution provides for the right to accessible and adequate housing, clean and safe water, and social security, among other social and economic rights. All of these rights support the broad realisation of the right to health.

The recognition of the right to health translates the provision of those rights to a duty of the national government and the county governments levels, in accordance with the framework that is set out under the Fourth Schedule to the Constitution and the relevant Transitional Authority gazette notice that unbundles the functions in the Fourth schedule. Furthermore, even before the promulgation of the Constitution, the Country had committed itself to various regional and international human rights instruments that required state parties to implement and facilitate the realisation of the right to health. Article 2 (6) of the Constitution provides that “any treaty or convention ratified by Kenya shall form part of Kenya under this Constitution”. Accordingly, realisation of the right to health is not only a constitutional imperative but also a realisation of Kenya’s external commitments to realise the right to health.

Table 1: Regional and International Instruments on the Right To Health

Provisions Of International Instruments	Key Focus
Article 12 <i>The International Covenant on Economic, Social and Cultural Rights (ICESCR)</i>	<ul style="list-style-type: none"> Recognizes the right of everyone to the highest attainable standard of physical and mental health.
Article 5 <i>The International Convention on the Elimination of racial Discrimination (ICERD)</i>	<ul style="list-style-type: none"> Provides for non-discrimination in the enjoyment of rights including the right to public health.

Table 1: Regional and International Instruments on the Right To Health

<p>Article 5 <i>The International Convention on the Elimination of racial Discrimination (ICERD)</i></p>	<ul style="list-style-type: none"> Provides for non-discrimination in the enjoyment of rights including the right to public health.
<p>Articles 10 and 12 <i>United Nations Convention on the Elimination of All forms of Discrimination Against Women (CEDAW)</i></p>	<ul style="list-style-type: none"> Shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
<p><i>The African Charter on Human and People rights (Banjul Charter)</i></p>	<ul style="list-style-type: none"> Provides that every individual shall have the right to enjoy the best attainable state of physical and mental health.
<p>Article 14 <i>The African Charter on the Rights and Welfare of the Child (ACRWC)</i></p>	<ul style="list-style-type: none"> Provides that every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.
<p>Article 24 <i>UN Convention on the Rights of the Child (CRC)</i></p>	<ul style="list-style-type: none"> Recognizes the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.
<p>Article 25 <i>UN Convention on the Rights of Persons with Disability (CRPD)</i></p>	<ul style="list-style-type: none"> Provides for the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.

Implementation of the health sector reforms, in view of the new constitutional framework, requires the alignment of laws and policies to the current constitutional order. As a result, there is a need for new laws at the county level and revised or new laws at the national level. Additionally, the redistribution of functions between the two levels affects the restructuring of institutions in the health sector. This audit reviews the laws and other legal instruments establishing these institutions to ensure that to the extent that they carry out functions that have been devolved, they will need to be restructured to ensure compliance with the constitution.

The Constitution of Kenya 2010 is, therefore the primary standard for guiding the audit of the policies and legislation on Health; it is expected that the actual drafting of the revised/ amended policies and laws following the recommendations from this audit, will take on board the other relevant technical issues concerning the sector.

To guide the implementation of laws and policies, the Transition Authority developed a framework for understanding, in a greater detail, the functions transferred to counties. This is contained in a gazette notice that was published in August 2013. The details of the various functions are provided in the table below.

Table 2: County Government Functions in the Health Sector

Function	Content of functions
County health facilities	<ul style="list-style-type: none"> • County hospitals • Sub-county hospitals • Rural health centres • Dispensaries • Rural health training and demonstration centres, • Rehabilitation and maintenance of county health facilities including: <ul style="list-style-type: none"> ○ maintenance of vehicles, ○ medical equipment and machinery, ○ Inspection and licensing of medical premises including reporting.
County health pharmacies	<p>Specifications, quantification, storage, distribution, dispensing and rational use of medical commodities Provided that until alternative intergovernmental arrangements are made, all counties shall procure medical commodities from the Kenya Medical Supplies Authority except where a particular commodity required by a county government is not available at the Kenya Medical Supplies Authority;</p>
Ambulance services	<ul style="list-style-type: none"> • Emergency response • Patient referral system
Promotion of primary healthcare	<ul style="list-style-type: none"> • health education, • health promotion, • community health services, • reproductive health, • child health, • tuberculosis, HIV, malaria, • school health program, • environmental health, • maternal health care, • immunization, • disease surveillance, • outreach services, • referral, • nutrition, • occupation safety, • food and water quality and safety, • disease screening, • hygiene and sanitation, • disease prevention and control, • ophthalmic services, • clinical services, • rehabilitation, • mental health, • laboratory services, • oral health,

Function	Content of functions
Promotion of primary healthcare	<ul style="list-style-type: none"> • disaster preparedness and disease outbreak services. • planning and monitoring, • health information system (data collection, collation, analysis and reporting), • supportive supervision, • patient and health facility records and inventories;
Licensing and control of undertakings that sell food to the public	<ul style="list-style-type: none"> • food safety and control;
enforcement of waste management policies, standards and regulations	<ul style="list-style-type: none"> • refuse removal (garbage): <ul style="list-style-type: none"> ○ provision of waste collection bins, ○ segregation of waste at source, ○ licensing of waste transportation; • refuse dumps including: <ul style="list-style-type: none"> ○ zoning waste operation areas, ○ conducting environmental impact assessment for the siting of dumps, ○ fencing of dumps, ○ controlling fires, ○ monitoring waste.
Veterinary services	<ul style="list-style-type: none"> • coordinate and oversee veterinary services including clinical services • artificial insemination, • reproductive health management

2.2 National Policies

The national government under the new constitution is charged with the responsibility of policies and strategies definition while counties are responsible for the implementation of the same to guide the health service delivery. Aligning policies to the new constitution is vital to guide the two levels of governments in achieving national priorities in order to avoiding policy implementation failure. Policies defines the action plan and identifies the responsibilities of each level of government in order to achieve the policy set objectives. Thus, failure to articulate the policies in relation to the implementation level creates confusion and duplication of functions leading to wasted resources.

Policies also define the resources both financial and human, required to implement the policy. Hence when a policy does not articulate the process of provision and the role of the level of government that is responsible, the priorities are not well financed or supported with necessary human resources for their implementation.

In addition, policy implementation may rely on development of new systems to facilitate the implementation of the planned priorities and unlock the foreseen progress accruing from the policy implementation. Furthermore, coordination between the two levels of government allows smooth implementation, follow up, and common understanding. When such systems are not put in place due to lack of policy or strategy clarity, the two levels of government do not have an idea of what the other is doing. This makes monitoring of achievements accruing from policies and strategies from a national level impossible. If results of a policy or strategy cannot be confirmed, then the policy is deemed failed.

The purpose of audit of the policies and strategies in the health sector has been to confirm the extent to which the policies are aligned to the new constitution and identifying areas that need to be addressed ensure the policies and strategies are aligned to achieve the set objectives thus avoiding policy/strategies failure. The audit examined the following policy documents.

National policies

- » Kenya Health Policy, 2014-2030
- » Kenya National e-Health Policy, 2016-2030
- » Health Information Systems Policy
- » The National Food and Nutrition Security Policy (NFNSP) - Kenya
- » Mental Health Policy, 2015 – 2030
- » HIV and AIDS Policy, (2009)
- » National Reproductive Health Policy: Enhancing Reproductive Health Status for all Kenyans, (2007)
- » Kenya Adolescent Reproductive Health and policy, 2015
- » National Maternal, Infant and Young Child Nutrition, Policy Guidelines, 2013.

Strategies

- » Transforming Health: Accelerating Attainment of Universal Health Coverage: Kenya Health Sector Strategic and investment Plan (KHSSPI) July, 2013 –2017
- » The Kenya National Strategic Plan on Tuberculosis, Leprosy and Lung Diseases, 2015 – 2018
- » Tobacco Control and Prevention Strategy Towards Tobacco Free Kenya, 2012 – 2017
- » Kenya National Strategy for the Prevention and Control of Non-Communicable Diseases, 2015 – 2020
- » The National Cancer Control Strategy, 2017 – 2022
- » Health Sector Human Resources Strategy, 2014-2018
- » Kenya Health Sector Referral Strategy, 2014–2018.

Detailed recommendations are provided in the tables. However generally, a number of policies require complete overhaul because they are out-dated. A number need to be reviewed to clearly define the role of counties as the implementing agencies. All policies and strategies require a plan for dissemination and domestication at county level to address the specific need of each county.

Table 3: A Review of the Applicable Health-Sector Policies Tabulated in a Matrix

Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>Kenya Health Policy, 2014-2030</p> <p>Objective:</p> <ol style="list-style-type: none"> 1. Eliminate communicable conditions 2. Halt and reverse the rising burden of non-communicable conditions 3. Reduce the burden of violence and injuries 4. Provide essential healthcare 5. Minimize exposure to health risk factors 6. Strengthen collaboration with private and other health-related sectors 	<ul style="list-style-type: none"> ▪ The policy complies with Devolution as it identifies the mandate of each level of government. ▪ However, it is not possible to confirm the level of implementation. ▪ There is also need to confirm the extent to which counties are aware of the policy and if they are using it. ▪ Also, it is important to establish the number of counties that have domesticated the policy to meet their unique needs and set up their priorities and investments. 	<ul style="list-style-type: none"> ▪ There are residue functions still under national government especially under the national parastatals and Sagas that need to be addressed. ▪ Such institutions include NACC, NHIF, all human resource responsible for registering and regulating human resource for health ▪ Except for KEMSA, all parastatals under the national government are not devolution compliant but they are undertaking county functions. Such organizations include NACC, the Kenya Blood Bank, Kenya Poisons Board, all bodies that register and regulate health workers. ▪ The policy is fully operationalized at national level ▪ Poor dissemination of the policy at county levels mean poor implementation due to lack of in depth understanding of objectives and orientation. ▪ It is not clear the number of counties that are aware of this policy and that have customized the policy to address issues that are unique to the counties. ▪ The policy proposes a universal health care with counties participating. 	<ul style="list-style-type: none"> ▪ Need to review the policy at midterm to allow adjusting changes that have resulted due to deepening of devolution. ▪ Identify all parastatals that are undertaking county functions in contravention of the constitution and have them change to be inter-governmental institutions. Such parastatals include NHIF, NACC etc. ▪ All residue functions that are county functions that are performed at national levels need to be devolved.

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<p>Kenya National eHealth Policy, 2016-2030</p> <p>Towards attainment of the highest standard of health through adoption and use of ICT</p> <p>Objective:</p> <p>To create an enabling environment for the</p> <ul style="list-style-type: none"> ▪ Sustainable ▪ Adoption, ▪ Implementation and ▪ Efficient use of e-health products and services at all levels of health-care delivery in Kenya. 	<ul style="list-style-type: none"> ▪ The development of the policy included participation of both national and county governments. Participation of the counties is key because 95% of health care is provided at the county levels that would benefit from elaborate eHealth systems to improve health services. ▪ Given that eHealth policy cannot be implemented in isolation, this document is anchored on the policy frameworks provided by the Kenya Health Policy (2014 - 2030), Health Information Policy (2014 - 2030), and the ICT Policy 2006. ▪ Currently, over 35 counties have at least one eHealth project with Nairobi, Mombasa and Kisumu Counties taking the lion share of the projects. Comparatively, Peri - Urban Regions like Busia, Kakamega and Vihiga have a good number of eHealth projects while Counties in Arid and Semi - Arid Regions such as Turkana, Wajir, Garissa, Samburu, Marsabit and Mandera have the least number of eHealth systems and interventions. 	<p>This calls for reforming the NHIF to make it compliant with devolution but this is yet to be done.</p> <p>The policy is new as it was finalized in 2016.</p> <ul style="list-style-type: none"> ▪ To operationalize this policy and achieve intended objectives will require heavy investment both by the national and county levels. ▪ Need to define the role of fund raising because the level responsible is not clear. The policy seems to allocate this responsibility to national government yet counties also need to raise funds for county functions including for establishment of eHealth systems. ▪ The national government is lying cables establishing connectivity across towns including to hospital facilities. The role of the county in this regard will need to be clarified as it is not clear. 	<p>This being a new policy, there should be emphasis on dissemination so that counties can be clear on their roles and responsibilities especially on regulations of the systems that are already operational</p>

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	<ul style="list-style-type: none"> ▪ Over 35 counties are implementing eHealth but the ownership and implementation of the interventions/ projects are by donor partners and Non-Governmental Organisations (NGOs) raising the issue of ownership and sustainability. ▪ The policy is meant to provide a regulatory framework that provides guidance on ownership of eHealth projects. This policy will minimize duplication and fragmentation of these interventions while increasing acceptability and sustainability of eHealth conventional healthcare sector. ▪ The policy includes institutional structures that include counties showing their role in the implementation of the policy. The national government role includes capacity development and standards. 		
Health Information Systems Policy Guides: The Health sector in <ol style="list-style-type: none"> 1. Developing and 2. Implementing an information system capable of producing quality data and information. 	<ul style="list-style-type: none"> ▪ The policy is compliant to the extent that there exists a system that collects and collates the health information system. ▪ One system provides for standardization across the country with defined country indicators that generally show the health sector performance. 	<ul style="list-style-type: none"> ▪ Health information is collected from the lowest to the highest health facilities. Health facilities are divided between the National and County governments in accordance with each level of government mandate. 	<ul style="list-style-type: none"> ▪ Need to review the policy to align it to devolution. This will allow a two tier Health Information System (HIS) ▪ The two -tier would have overall indicators to demonstrate country's performance and progress on key health parameters that would also allow comparison with international health goals that the country has signed to:

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<p>3. To capture data that shows trends on the performance and progress towards achieving the health sector's objectives.</p> <p>4. supports the availability of reliable and relevant health information, for planning and evidence-based decision on resource allocation for improved quality of health services countrywide.</p>	<ul style="list-style-type: none"> However, this does not allow for counties specific indicators that would mirrors counties priorities 	<ul style="list-style-type: none"> Currently data is collected from dispensaries health centers, sub-county hospitals, county referral hospitals. The data is fed into the HIS and transmitted to the national Ministry of Health . The record officers are county officers but it is not clear which level of government is responsible for building their capacity, career development etc. The policy is inconsistent to the following extent: <ul style="list-style-type: none"> The policy was developed before devolution with limited consultation of counties. The Health Information Management Systems that existed before the current policy changed only in name to HIS. The system of data collection did not change: data is primarily collected at facility level and uploaded to the electronic system and transmitted to MOH with no management at county level. The indicators are the nationally defined indicators and there is no way of measuring county-specific indicators if a county wanted to gather more detailed information through the same information system. MOH has retained the management role of the data collected from the counties. 	<ul style="list-style-type: none"> The second tier/level would include county indicators to allow counties capture county specific data on priorities thus providing evidence for county decision making. A review would allocate responsibility on the management including analysis and use of the data and information collected at both levels of the government. Clarify the responsibility of each level on resource mobilization for system strengthening including human resource.

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		<ul style="list-style-type: none"> The national has dictated the national indicators on which data is collected and counties cannot add any specific indicators that they would apply to their priorities or vary in terms of depth of the data collected. The MOH allocated itself the role of resource mobiliser for systems strengthening both for the human resource and the technology development. Counties thus have to take what the MOH prescribes. While this allows for standardized technological development across the country, it is not clear the level that is responsible for data collection tools- data collection is still done manually at county level facilities. 	
<p>The National Food and Nutrition Security Policy (NFNSP)</p> <p>Objective:</p> <ol style="list-style-type: none"> To achieve good nutrition for optimum health of all Kenyans. To increase the quantity and quality of food available, accessible and affordable to all Kenyans at all times. 	<ul style="list-style-type: none"> The policy is fully compliant with the constitution where agriculture sector is concerned. From an agriculture perspective, counties are responding with various interventions that will ensure they are food secure. From a health perspective, the operationalization is weak. The National Nutrition Action is centralized and all projects/interventions are vertically managed from the national level. 	<ul style="list-style-type: none"> Policy is compliant. Problem is the Health National Nutrition Action Plan whose management requires to be devolved to allow counties to control the management of the implementation of their functions e.g. quantification, procurement of the nutrition commodities. 	<ul style="list-style-type: none"> The policy is still very relevant to the nutrition sector hence no need for review. The Action Plan operationalizing the policy at health sector need to let counties control their functions. The current Action Plan (2012 - 2017) is contrary to the constitution and is implemented with little consultation /participation of counties. County involvement in developing future NNAP is emphasized. MOH must also let counties undertake those functions that are part of county functions.

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<p>3. To protect vulnerable populations using innovative and cost-effective safety nets linked to long-term development.</p>	<ul style="list-style-type: none"> ▪ The Policy is still very relevant and there are many sub-policies development addressing specific areas of intervention like the food fortification, breast milk substitutes. There are also guidelines developed under the strategic objectives that need to be disseminated and availed to counties for implementation. ▪ The National Food and Nutrition Security Policy developed in 2011 is domiciled in Ministry of Agriculture but the Nutrition part is implemented by a number of Ministries including Ministry of Health for the specific nutrition interventions. At county level, the implementation of nutrition also takes a multi-sectoral approach that includes Ministries of Agriculture, Health, Education, Water and Social Protection. ▪ The policy is operationalized both at national and county levels through the National Nutrition Action Plan that is implemented through the 13 Strategic Objectives. 		<p>For example, planning for nutrition commodities and procurement of the same is a county function.</p>

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Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>Kenya Mental Health Policy, 2015 - 2030 Towards Attaining the Highest Standard of Mental Health</p> <p>Objectives:</p> <ol style="list-style-type: none"> To strengthen effective leadership and governance for mental health. To ensure access to comprehensive, integrated and high quality, promotive, preventive, curative and rehabilitative mental health care services at all levels of healthcare. To implement strategies for promotion of mental health, prevention of mental disorders and substance use disorders. To strengthen mental health systems. 	<ul style="list-style-type: none"> Because nutrition has in the past taken an emergency perspective, counties that have emergency interventions especially the ASAL and Semi-ASAL Counties have greater operationalized policy by making nutrition a priority and increased investments unlike counties limited or no need for emergency response. The policy has limited compliance with constitution. The policy mentions the counties only once in reference to confirming the policy will be implemented at county health facilities. It does not elaborate on the how. Organization of mental health services should be in accordance with Schedule 4 of the Kenyan Constitution : The National Government shall be responsible for health policy, the national referral health facilities, capacity building and technical assistance to the counties and disaster management. The County Health Services shall be responsible for county mental health facilities, promotion and provision of comprehensive mental health care services at all levels, emergency services and an effective mental health referral system. 	<p>Compliant to the extent it is applicable to services provide by the national government.</p> <ul style="list-style-type: none"> County hospitals provided mental health services. But this is not recognized because the major referral hospital for mental health services is under the National Government where all specialists also operate from. The Board of Mental Health that the policy entrusts with the provision of the overall oversight in mental health is a national SAGA hence has no oversight over county mental health services. The policy is operationalized at National level because the largest Mental health facility is under the national Government. The level of implementation at county level is unknown. It is not also clear whether there has been dissemination of the policy and related guidelines at county level. 	<ul style="list-style-type: none"> The policy need to recognize that the bulk of mental health services are provided by both counties government. The policy mentions counties in passing but does not elaborate how the objectives would be implemented at county level or the collaboration between the two levels of governments would be enhanced. Kenya currently has inadequate data and information on the prevalence of Mental Health, Neurological and Substance Use (MNS) in Kenya. There is need to include key indicators for mental health to facilitate tracking services and prevalence levels. Need to integrate mental health with primary health care in order to broaden services, improve access to the services and reduce stigma.

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	<ul style="list-style-type: none"> The direct relationship between the national mental health services and the county mental health services shall be determined through the operational guidelines developed for this policy. 		<ul style="list-style-type: none"> In order to achieve the objectives of this policy, a multi sectoral approach will be necessary. The key ministries include: Education, labour, security, correctional services, children services, planning, finance, legal justice system, industrialization, agriculture. The policy proposes the amendment of the Mental Health Legislation to establish County Mental Health Councils that shall give oversight to mental health at county levels. There is need for broad based discussion to agree on functionality and implementation of the proposed councils vis-à-vis established county oversight roles on health provision. Poor financing of mental health has contributed to lack of services. There is need to have a budget dedicated to mental health both at National and County levels. Availability of data mentioned above will facilitate evidence based planning and investments including for HR. Counties need to confirm viability of establishing community health financing programmes to support mental health services. Public private partnerships and voluntary private sector participation in provision of mental health services and financing need to be encouraged.

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Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>HIV and AIDS Policy, (2009)</p> <p>Objective:</p> <ol style="list-style-type: none"> 1. Setting Minimum Internal Requirements (MIR) for managing HIV and AIDS in the workplace; 2. Establishing and promoting programmes to ensure non-discrimination and non-stigmatization of the infected; 3. Contributing to national efforts to minimize the spread and mitigate against the impact of HIV and AIDS; 4. Ensuring adequate allocation of resources to HIV and AIDS interventions; 5. Guiding human resource managers and employees on their rights and obligations regarding HIV and AIDS. 	<p>Not compliant. It focuses on the ministry instead of addressing issues of HIV at Workplace in general and especially at county levels. Policy was developed before the new Constitution and devolution.</p>	<p>The entire policy is not compliant to constitutional. It is implemented at national levels across all ministries even though it focus was the Ministry of Gender, Children and Social Development</p>	<ul style="list-style-type: none"> ▪ Engage sectors that have mental health components to make targeted budgetary allocation to mental health services and programmes ▪ Develop a National strategic program on substance use prevention, treatment, care and rehabilitation.
			<p>(1) Need to review the policy to take into consideration changes and developments that have occurred since 2009 to address HIV/AIDS at workplace both at national and county levels.</p>

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<p>National Maternal, Infant and Young Child Nutrition Policy Guidelines, 2013</p> <p>Objectives:</p> <ol style="list-style-type: none"> To protect, promote and support exclusive breastfeeding for the first six months of a child's life and continued breastfeeding up to two years or beyond. To promote the timely introduction of appropriate, safe and adequate complementary foods at 6 months while continuing breastfeeding Support e-MTCT services while promoting optimal IYCF in HIV -exposed children for overall child survival Enhance optimal MIYCN in other exceptionally difficult circumstances To strengthen and accelerate family, community and health care support and mechanisms to achieve optimal MIYCN To support and enhance the provision of enabling environment for working mothers, fathers and other caregiver, both in formal and informal employment to provide optimal infant and young child nutrition To strengthen research, monitoring and evaluation systems to support policy guidance for MIYCN 	<p>The policy is compliant with the constitution and in its implementation framework, the policy clearly defines responsibility of each levels of the government.</p> <ol style="list-style-type: none"> National Level <ul style="list-style-type: none"> Provide leadership, guidance and coordination to all stakeholders providing MIYCN services. Give effect to the principles and regulatory framework of the Breast Milk Substitutes (Regulation and Control) Act, 2012 . County level <ul style="list-style-type: none"> Engage and provide oversight to CBOs, FBOs and NGOs operating in the community – strengthen coordination. Monitor the implementation of the policy across all health care levels. 	<p>To ensure standardized implementation across all counties, there is need to focus on dissemination of both the policy and guidelines and standards. There is also need to integrate the interventions of this policy with other programmes focusing on child health to achieve efficient and effective implementation.</p>	<ul style="list-style-type: none"> Need to disseminate the policy beyond the 23 ASAL and Semi-ASAL Counties . Need also to disseminate the guidelines and standards especially on breast milk substitutes. Seek to integrate the provision of this policy with maternal and child health for effective implementation.

Table 4: A Review of the Applicable Health-Sector Strategies Tabulated in a Matrix

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<p>Transforming Health Accelerating Attainment of Universal Health Coverage Kenya Health Sector Strategic and Investment Plan (KHSSIP), July, 2013-2017</p> <p>Focus areas:</p> <ol style="list-style-type: none"> 1. Increasing the numbers of KEPH interventions being provided across the Country (introduction of interventions as and where needed) 2. Increasing the coverages of populations using the different KEPH interventions (scale up of intervention use) 3. Reducing the household financial burden incurred at the point of access and utilization of KEPH services (reduce catastrophic health expenditures) 	<ul style="list-style-type: none"> ▪ The strategy is compliant with constitution. ▪ The implementation framework spells out each levels of government responsibilities. ▪ The strategy is operationalized at both levels of governance. However, the implementation of the strategy has been wanting as MOH has continued implementing county activities. ▪ For example, the maternity funds have been managed and disbursed by National MOH. The experience has been negative as counties have faced serious delays in disbursing the funds impacting negatively on service delivery. ▪ It is not clear how far the strategy has been disseminated to counties and aligned to counties' health investment plans. Some counties have moved ahead to establish financing schemes that cover their communities. Makuani is an example that is rolling a health care coverage for the poor. ▪ An example on unilateral decision from the planned investments areas under this strategy include the recently decision to have the maternity funds managed by NHIF. <p>While the decision is better than MOH managing the funds, there is need to ensure NHIF is an inter-governmental institution with counties, which are largest beneficiaries of NHIF services,</p>	<p>The non-compliance comes with details of implementing the strategy especially under the UHC.</p> <ul style="list-style-type: none"> ▪ For UHC to succeed, counties need to understand the different methodologies and approaches that would ensure sustainability of UHC. What is its impact on counties expenditure framework - who pays for what? Time it would take for Counties to improve quality of care etc. 	<ul style="list-style-type: none"> ▪ The strategy has followed up on various investment areas identified in the MTP II. Since this strategy is coming to an end, it will be important that a new one is developed jointly with counties with a framework that ensures MOH does not continue to undertake county functions unless there is clear inter-governmental agreement. ▪ For activities delegated by either level of government, an inter-governmental agreement need to be drawn in accordance to inter-governmental relations Act.

Table 4: A Review of the Applicable Health-Sector Strategies Tabulated in a Matrix (Cont'd)

Name of Policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>The Kenya National Strategic Plan on Tuberculosis, Leprosy and Lung Diseases, 2015–2018</p> <p>Objectives:</p> <ol style="list-style-type: none"> 1. Sustain the gains made over the past decade, in the context of a newly devolved health system 2. Intensify efforts to find the “missing” cases of TB, leprosy and lung disease 3. Reduce transmission of TB and leprosy 4. Prevent active disease and morbidity 5. Enhance the quality of care for chronic diseases 	<p>being members of its board to ensure they are part/influence the decision making process that impact on health services delivery at county level.</p> <ul style="list-style-type: none"> ▪ The strategy is fully compliant with the constitution. ▪ The strategy is meant to provide a smooth transition of TB management and control to county level in accordance with the constitution. ▪ The strategy identifies approaches for both national and county level in accordance with each level of government’s defined functions. ▪ The strategy implemented between 2014 and 2018 has prioritized smooth transition to the county-based systems of governance for the TB and Leprosy control programmes. This is to ensure gains made so far are not reversed as counties take up the responsibility of implementing TB and leprosy control programmes. ▪ The Strategy provide a number of approaches including articulating and documenting responsibilities for all TB activities between the two levels of government. 	<ul style="list-style-type: none"> ▪ The strategy is compliant. What need to be established is whether implementation has been undertaken as part of county functions ▪ Inclusion of TB funds in county budgets, quantification and procurement of the nutrition commodities. ▪ Like the on-going strategy, the recommended strategy will need to include: <ul style="list-style-type: none"> ▪ Definition of financial and human resource commitments, including technical assistance and necessary commodity management support from central MOH ▪ Ensure the county and sub-county structures can support all designated activities: e.g. identify a TB and leprosy focal point for each level, take inventory and address any capacity building needs; and develop on-the-job tools and disseminate existing guidance to promote national standards. ▪ Ensure inclusion of TB and leprosy within county health plans ▪ Stakeholders mapping at all levels and all stakeholders are engaged in county planning ▪ Establish County-based centres of excellence, based on strong performance 	<ul style="list-style-type: none"> ▪ The strategy is ending in 2018. ▪ There is need to start the process of developing a new strategy to ensure there is continuity in management of TB and Leprosy control programmes. ▪ More importantly ensure continued case notification and procurement of essential commodities for TB management especially of the MDR TB by county facilities.

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		<ul style="list-style-type: none"> ▪ Develop and implement a technical assistance and quality assurance plan through a cascade from central to community levels. ▪ The nature of technical assistance from central to county level must be expanded to build capacity for planning, advocacy, budgeting, quality assurance of labs and facilities, and data monitoring ▪ Ensure county ownership and designated funding of supportive supervision to sub - counties, health facilities, laboratories and community - based treatment partners. ▪ Promote the establishment of inter-agency coordinating committees to assist with planning, budgeting, implementing and monitoring activities. The ICCs include all partners, such as the private sector, MCH programme, CSOs and communities, at county and sub-county levels. ▪ Re-profile National MOH staff to ensure in-house capacity for: <ul style="list-style-type: none"> i). High-level policy formulation to include TB in emerging health system strategies, plans, and demand-side financing modalities including national health insurance and social protection programmes; ii). Coordination of health system structures for comprehensive program implementation by 47 counties; and 	

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Name of Policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>Tobacco Control and Prevention Strategy Towards Tobacco Free Kenya, 2012–2017</p> <p>Objectives:</p> <ol style="list-style-type: none"> To develop policy, regulations and guidelines for tobacco control To advise and guide in the carrying out of research on tobacco control and development activities To mobilize and map out resource for Tobacco Control Activities To Strengthen the infrastructure and capacity of TCB To Monitor & Evaluate the Activities on Tobacco Control Initiated by the Board 	<p>The strategy is not compliant. The strategy provides for a Tobacco Board to advise the Cabinet Secretary for Health. This Board does not include counties or provided advise on impact of tobacco use on health. This is in spite of the fact that health issues arising from tobacco use are mostly felt at county level because majority of health facilities are under county management.</p>	<p>iii). Continued technical leadership and support to counties. Additional skills, particularly related to economics and statistics, are required at the Program level to enhance planning and monitoring.</p> <p>The entire strategy is not compliant to the constitution. The strategy was developed before it's operationalized at the National level and no evidence of implementation at county level.</p>	<ul style="list-style-type: none"> Need to review the strategy since tobacco use impacts on county health provision hence need to develop a new strategy with county strong participation to ensure county issues are addressed.

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<p>Kenya National Strategy for the Prevention and Control of Non-Communicable Diseases, 2015-2020</p> <p>Objectives:</p> <ol style="list-style-type: none"> 1. Risk factor reduction 2. Strengthening and re-orientation of the health care systems to address NCDs 3. Advocacy and community mobilization 4. Health promotion 5. Research 6. Surveillance and the creation of networks and partnerships for disease control across various sectors 	<ul style="list-style-type: none"> ▪ The strategy is compliant with constitution. ▪ The strategic implementation framework spells out each level of government's responsibilities. ▪ The strategy is operationalized at both levels of governance. ▪ As soon as counties came into being, attempts have been made to increase accessibility and affordability of services for NCDs especially diabetes and cardiovascular diseases. ▪ A lot of counties have upgraded county referral hospitals and procured equipment that would improve quality of services through improved diagnosis and investigative procedures. <p>The leased health equipment undertaken by the National government on behalf of counties is an example of attempts to improve services for NCDs at county facilities.</p>	<p>The strategy has well elaborated objectives including actions that need to be taken to achieve each objective.</p> <ul style="list-style-type: none"> ▪ Under each objective, the role of each level of government is expounded. ▪ Already counties are strengthening their service delivery systems by hiring more health workers and equipping county hospitals with the leased equipment for health. ▪ Regarding integration with other programmes and existing frameworks, some counties have embraced the community strategy and engaged community health worker. <p>Also, counties have established maternal, child, adolescent programmes that can be integrated with the NCD interventions.</p>	<ul style="list-style-type: none"> ▪ The Strategy is relevant to both counties and national government. ▪ Emphasis should be on intensified dissemination so that counties are aware and use the strategy to ensure objectives of the strategy are included in the CIDPs to facilitate county prioritizing, planning and budgeting for the NCD prevention and control activities.
<p>The National Cancer Control Strategy (NCCS), 2017-2022</p> <p>Areas of Focus:</p> <ol style="list-style-type: none"> 1. Prevention, early detection and cancer screening 2. Cancer diagnosis, registration and surveillance 3. Cancer treatment, palliative care and survivorship 4. Coordination, partnership and financing for cancer control 	<ul style="list-style-type: none"> ▪ The strategy is compliant with constitution. ▪ The strategy is operationalized at both levels of governance ▪ It has clearly defined areas of operation for both levels of governments and other relevant stakeholders that are expected to enhance services for the control of cancer. 	<ul style="list-style-type: none"> ▪ It will be important to establish the levels of dissemination and extent to which the strategy is under implementation at county level. 	<ul style="list-style-type: none"> ▪ Cancer Prevention and Control is still relatively new area of intervention. Capacity is still limited both at national and counties levels. ▪ The current strategy based on the Health policy is very new and relevant with clearly defined roles for each level of government.

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<p>5. Monitoring, Evaluation and Research.</p>			<ul style="list-style-type: none"> ▪ All levels with responsibilities need to concentrate efforts on implementation of the strategy in order to reduce number of people developing cancer every year.
<p>Health Sector Human Resources Strategy, 2014 – 2018</p> <p>Objectives:</p> <ol style="list-style-type: none"> 1. Align the development of HRH Strategy to the Kenya Health Sector Strategic and Investment Plan, 2013 - 2017, Public Service Commission Act, 2012 and other evidence based HRH proposals, reports and assessments 2. Articulate future HRH investments areas, HRH coordination mechanism in the National HRH Strategic plan 3. Outline implementation framework for identified HRH priorities, budgetary estimates, resource mobilization plan, monitoring and evaluation plan and tools, and the implementation structures to support implementation of the identified priorities 	<ul style="list-style-type: none"> ▪ The strategy is fully compliant with the constitution. ▪ Implementation has been problematic due to many strikes that have faced the health sector since devolution ▪ The strategy has been operationalized both at the National and County levels. ▪ However, since devolution started in 2013, the health sector has faced serious labour issues with health staff going on strike many times demanding for better pay, training, standardized treatment of staff especially at county level, demands for health workers' commission and demand to return management of all HR to the national government including those at county facilities. These issues are as a result of insecurity ▪ enhanced by chaotic transition of health functions to counties including human resource working in county hospitals and administrative units. 	<ul style="list-style-type: none"> ▪ Though the strategy is compliant, there are issues with implementation. ▪ The counties have not been able to implement it fully due to counties limited human resource development and management capacity. ▪ Most of the county Boards are still weak and lack necessary capacity to manage and develop county human resources adequately. ▪ Thirdly, the recently passed health law included clauses that are not aligned to the constitution, creating more confusion. ▪ Thus, the above issues need to be addressed when developing the new strategy after 2018. 	<ul style="list-style-type: none"> ▪ The strategy is ending in 2018. ▪ There is need to start the process of developing a new strategy to ensure there is continuity in addressing HRH issues in a systematic and consistent manner. ▪ A clear strategy will create confidence in county systems and build county public service board capacity to manage and develop county HRH.

Name of Policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>Kenya Health Sector Referral Strategy, 2014 – 2018</p> <p>Objective:</p> <ol style="list-style-type: none"> 1. Referral Strategy deals with the management of four key movements 2. Patients/client movement 3. expertise movement 4. Specimen movement for investigative purposes 5. Movement if patient information for diagnostic purposes 	<ul style="list-style-type: none"> ▪ Not compliant. It does not define the roles of different levels of government especially at implementation level. ▪ The development of this strategy had started before the onset of devolution. However, it was finalized immediately after the transfer of functions to counties and it is noteworthy that it was not revised to factor explicitly county role in the referral system to strengthen the health services. ▪ The referral system has been operationalized but not in the manner described by the Strategy. ▪ The national government facilities particularly the National Kenyatta Hospital has complained of referrals sent from county facilities for services that could be undertaken at county level. This has been quoted as one major reason for congestion at the Tertiary facility impacting negatively on the ability of Kenyatta to provided quality services. 	<p>The entire strategy is not compliant to constitution. There is need to develop a new one that takes into consideration both levels of government’s responsibilities.</p>	<ul style="list-style-type: none"> ▪ The strategy is due to end in 2018 and there will be need for counties to be involved in the development of the next strategy because referral will impact on county health services. ▪ Referrals system has direct impact on county facilities’ ability to offer quality services if referral is not streamlined and prudently implemented.

2.3 National Legislation

A total 25 national laws and regulations in the health sector were reviewed. The audit reviewed the sector legislation in accordance with the Constitutional framework, and specifically the fourth schedule where health responsibilities are distributed between the two levels of government. The audit highlights any sections that are unconstitutional, obsolete or requiring alignment to the constitution. The laws reviewed are as listed below:

- » Health Act (Act No. 21 of 2017)
- » Kenya Medical Supplies Authority Act (Act No. 20 of 2013)
- » HIV/AIDS Prevention and Control Act (Act No 14 of 2006)
- » Pharmacy and Poisons Board Act.
- » Public Health Act (This one interphases with the Health Act)
- » Mental Health Act (Cap 248)
- » Anatomy Act (Cap 249)
- » Narcotic Drugs and Psychotropic Substances Act (Act No. 4 of 1994).
- » Public Health Officers (Training, Registration and Licensing) Act (Act no. 12 of 2013)
- » Kenya Medical Training College Act (Cap 261)
- » National Authority for the Campaign Against Alcohol and Drug Abuse Act (Act No. 14 of 2012)
- » The Alcoholic Drinks Control Act (Act No. 4 of 2012)
- » Human Tissues Act (Cap 252)
- » Counsellors and Psychologists Act (Act No. 14 of 2014).
- » Clinical Officers (Training, Registration and Licensing) Act (Cap 260)
- » Health Records and Information Managers Act (Act No. of 15 of 2016)
- » Malaria Prevention Act (Cap 246)
- » Clinical Officers (Training, registration and Licensing) Act (Act No. 20 of 2017)
- » National Health Insurance Fund Act (Act No. 9 of 1998).

Regulations

- » Pharmacy and Poisons Board Rules (Legal Notice No. 86 of 1957 as amended by L.N. 443/1957, L.N. 332/1958, L.N. 426/1958, L.N. 498/1958, L.N. 550/1959, L.N. 114/1960, L.N. 587/1961, L.N. 242/1963, L.N. 631/1963, L.N. 92/1964, L.N. 365/1964, L.N. 115/1968, L.N. 125/1969, L.N. 248/1969, L.N. 41/1971, L.N. 120/1984, L.N. 52/1984, L.N. 51/1985, L.N. 61/2002, L.N. 91/2004 and L.N. 191/2010)
- » Pharmacy and Poisons (Conduct of Inquiries) Rules (Legal Notice No. 52 of 1985)
- » Pharmacy and Poisons (Registration of Drugs) Rules (Legal Notice No. 147 of 1981 as amended by L.N. 142/1991 and L.N. 192/2010)
- » Pharmacy and Poisons (Control of Drugs) Rules (Legal Notice No. 180 of 1969 as amended by L.N. 247/1969, L.N. 228/1974)
- » Mental Health Act (Board Meetings) Regulations, 2000
- » Narcotic Drugs and Psychotropic Substances (Control) Restraint and Forfeiture Regulations, 1997 (L.N. 547/1997)
- » Narcotic Drugs and Psychotropic Substances (Control) (Seizure, Analysis and Disposal) Regulations, 2006 (L.N. 16/2006).

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
Health Act Act No 21 of 2017	Section 6 on reproductive health rights could have incorporated more of the reproductive health rights provided in the international treaties like the Maputo Protocol as is required by Article 21 of the Constitution .		Include the treaty provisions on reproductive health rights from ICESCR and Maputo Protocol .
	Section 6 (1)(c) has classified difficult conditions occurring during pregnancy like ectopic, abdominal and molar pregnancy or any other condition that makes the life of the mother or child to be threatened as comprising ‘notifiable condition’.	When read together with Sections 17 of the Public Health Act that defines notifiable diseases as those that are contagious diseases this will stigmatize women. It will discourage health professionals from providing emergency treatment to women with pregnancy related complications. The section is inconsistent with Article 28 of the Constitution and related treaty provisions on the right to dignity and Section 5(2) of the Act, which provides that every person has the right to be treated with dignity, respect and have her/his privacy respected.	Repeal as this facilitates the violation of pregnant women’s rights to the right to privacy and to non-discrimination. The clause only services to stigmatise women with difficult pregnancies.
	Section 6 (2) requires that conditions anticipated under section 6 (1)(c) be carried out by “ a health professional who has been trained to manage pregnancy-related complications in women and who has obtained a license from the recognized regulatory authorities to carry out that procedure ”.	This provision is discriminatory for requiring a special license that is not required of other medical procedures. It will sentence so many women because of creating special qualification for those who handle them. The provision also limits the right to access reproductive health care for many women.	Review to remove the requirement for special license for people handling pregnancies. Rephrase to ensure clarity and to avoid the possible interpretation that will see many women not attended.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>Section 7 (3) provides that every medical institution that fails to provide emergency medical treatment while having ability to do commits an offence.</p>	<p>This provision violates Article 43 (2) of the Constitution that provides that “no person shall be denied emergency medical treatment”. Right to emergency medical treatment cannot be qualified in law and made subject to the ability to provide. The clause may facilitate a claw back.</p>	<p>Amend to rephrase so that every medical institution will have responsibility to either provide the treatment or refer and facilitate transfer as necessary; they must not turn away any case.</p>
	<p>Section 15 (1)(c) is vague to the extent that it mandates the national government to “ensure the implementation of the right to health specified in the Bill of Rights...”.</p>	<p>Service delivery is at the core of the Implementation of the right to health and is largely a county function; the role of the national government is to develop national policies, manage national referral services, set standards to guide implementation and give technical support. There is need for clarity through review or during implementation of this provision to ensure respect for the principle of separation of powers and the functional assignment between the 2 levels of government.</p>	<p>Section 15 (Duties of National Government) may require clarity on the role of the national government in ensuring implementation of the right to health to ensure respect for the principle of separation of powers.</p>
	<p>Section 18 (Directorates) provides for the formation of directorates and details the matters that the directorates should deal with, some of which include county functions e.g. pharmaceutical services.</p>	<p>It is essential therefore for the section to be un-bundled to ensure that the function focuses on the national government functions of standard setting and not implementation of services that are the preserve of county governments.</p>	<p>This provision should limit the roles of the directorates to functions of the national government as provided in the Fourth Schedule to the Constitution.</p>
	<p>Section 20 of the Act provides for the role of county governments in implementing national health policies and standards.</p>	<p>The section is silent on the legislative authority of county governments to ensure that counties develop county laws, policies and administrative</p>	<p>The provision should include the duty of county governments to enact own laws as provided by Article 185 of the Constitution and</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
		procedures that give effect to the right to health.	Section 22 of the County Government Act .
	<p>Section 45 establishes the <i>Kenya Health Professions Oversight Authority</i> mandated with among other functions joint inspection with other regulatory bodies.</p> <p>Section 60 obligates inspection, monitoring and evaluation of standards of performance to respective bodies provided they are not in conflict with functions of the Authority.</p>	The existence of many bodies performing almost similar functions creates an environment of conflict and duplication of functions/roles hence imprudent use of resources.	Regulation of professionals should be limited to one body to avoid duplication of roles. This includes repealing of the myriad of regulatory bodies enlisted in Section 60 .
	Section 62 of the Act provides for the enactment of Act for: Health Products and Health Technologies.		There is need to advocate for the development and enactment of this law.
	Section 67 (2) and (3) (<i>Procurement of Health Products and Technologies</i>) includes the classes of products that shall be procured by KEMSA and provides that KEMSA may be a first point of call for procurement of health products at county referral level respectively.	Reference to KEMSA in the Act indirectly applies undue pressure upon counties to procure from KEMSA without due regard for counties to be able to procure on their own.	Counties should be enabled to procure health products and technologies from other organizations apart from <i>Kenya Medical Supplies Authority (KEMSA)</i> , however there is need for standards to be set to ensure that the medical supplies that are purchased through KEMSA or otherwise meet the required standards.
	Section 67 of the Act mandates the national government with providing guidelines for procurement, distribution and		There is a need to implement the same.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	management of health products and technologies.		
	Section 70 makes an amendment to only one section of the Public Health Act .	The section is silent on provisions of other sections of the Act which have either become obsolete or are unconstitutional to the extent that some of the provisions assign functions to the National Government that have since been devolved to the County Government by the Fourth Schedule to the Constitution including Sections 7 which establishes district health management boards; Section 15 which requires the Minister to be consulted over municipal council by-laws; Part XIII on cemeteries and Section 151 among others.	Review and amend the whole of Cap 242 (Public Health Act) and not merely one provision of the Act.
	Section 75 provides for the establishment of a different regulatory body to regulate the practice of traditional medicine and alternative medicine.	Section 62 provides for the establishment of a single regulatory body for regulation of health products and technologies. The establishment of two bodies undertaking functions that can be undertaken by one body is a misuse of resources contrary to Article 201 of the Constitution and is likely to cause conflicts among the two organizations.	Regulation of traditional and alternative medicine should be restricted to the single regulatory body regulating health products and health technologies established in section 62.
	Section 80 (3) provides that the Cabinet Secretary shall regulate the criteria for approval of organ transplant facilities.		There is need for the Cabinet Secretary to be advised to provide regulations.
	Section 85 (1) provides for the enactment of an act of parliament to establish the <i>Kenya Blood Transfusion Service</i> .		This law should be enacted.

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>Section 86 (f) provides that the department of health shall ensure progressive financial access to universal health coverage by taking measures that include ... ensuring that all pharmaceutical and non-pharmaceutical products correspond to Kenya Medical Supplies Authority market prices.</p>	<p>The Act should limit the role of KEMSA to research and providing guidance to the Cabinet Secretary which would be in line with Section 4 (1) (d) of the KEMSA Act which mandates the Authority to collect information and provide regular reports to the national and county governments on the status and cost-effectiveness of procurement and the value of prescribed essential medical supplies.</p>	<p>The National Government through the Ministry should be the body with the mandate to constantly guide on market price standards for pharmaceutical products, limiting the role of KEMSA to research and providing guidance to the Cabinet Secretary on the market price standards.</p>
	<p>Section 100 (3) provides for enactment of legislation to give effect to Section 100 on the research or experimentation on minors for therapeutic and non-therapeutic purposes.</p>		<p>This legislation should be enacted.</p>
	<p>Section 104 provides for enactment of legislation on E-legislation</p>		<p>This legislation should be enacted.</p>
	<p>Section 105 (3) provides that the Cabinet Secretary shall prescribe policy guidelines on integrated comprehensive health information management system.</p>		<p>These policy guidelines should be formulated.</p>
	<p>The act fails to recognize and provide for health as a consumer right.</p>	<p>Article 46 of the Constitution provides that consumers have the right to the protection of their health.</p>	<p>Amend the Act or provide for the need for regulations to addresses Article 46 of the Constitution on the health rights of consumers.</p>
	<p>The Act is silent on the issue of establishment and operation of morgues.</p>	<p>County governments are mandated with the role of establishing and maintaining</p>	<p>Amend the Act to include a provision that mandates the National Government in</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
		cemeteries/morgues. However, the role of setting standards is that of National Government.	consultation with County Governments to set standards on Morgues.
	The open-ended exercise of the right to demonstrate, strike, picket by health worker without limitation has caused unnecessary loss of lives and will continue doing so if it is not limited.	Health services are essential services that are central to the protection of the right to life. A limitation of the right to picket and strike for health workers will assist in ensuring that lifesaving services are provided during strikes.	The Act should incorporate limitations on the right to demonstrate in line with Article 24 of the constitution to protect the right to life.
Kenya Medical Supplies Authority Act Act No 20 of 2013	Section 4 (1)(b) provides for the establishment of a network of storage packaging and distribution facilities for the provision of drugs and medical supplies to health institutions.	There is need to provide for consultation with county government to ensure the storage networks are not rendered nonfunctional by the counties if they are not in agreement.	Prudent use of resources should be a key consideration in the establishment of storage networks.
	Section 4 (1)(c) of the Act is silent on the mode of partnership between KEMSA and the counties.		There may be need for regulations to guide on partnerships between KEMSA and the counties and the establishment of framework with County Governments for purposes of providing services in procurement, warehousing, distribution of drugs and medical supplies.
	Section 4 (1)(d) provides for the authority to collect information and provide regular reports to the national and county governments on the status and cost effectiveness of procurement and distribution and value of prescribed essential medical supplies delivered to health	There is need for clarity on the provision to ensure that the Authority is not undertaking a county function with regards to stock status but the same is limited to stock available in KEMSA stores.	The provision should ensure compliance with the principles of devolution

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	facilities, <u>stock status</u> and any other aspect of supply system status.		
	Section 6 (2)(g) provides among the powers of KEMSA board is to incorporate, develop and operate a division or subsidiary of the Authority for procurement, storage and supply of medical supplies to health facilities and institutions.	This is inconsistent with Section 67 (3) of the Health Act which provides that KEMSA shall endeavor to establish branches within each county at such locations as it may determine. The provision should ensure consistency whether it is branches or subsidiaries that are being established to provide consultation with county government to avoid competition with the counties.	The powers should be consistent with the Health Bill, 2017 .
HIV/AIDS Prevention and Control Act No 14 of 2006	The Act uses terminologies that no longer apply in the current constitutional dispensation. For example, the use of the term “Minister”.	Review of the Act will ensure that certain terminologies such as “Minister” is changed to “Cabinet Secretary” and that the definition of “partner” complies with the Constitution article 27 in compliance with the Constitution and will ensure that the Act is not in conflict with the Health Act 2017 .	The Act requires review to amend various terminologies including Minister which no longer exists as per the Constitution .
	Section 4 provides for the role of the <u>Government</u> in promoting public awareness in HIV and AIDS education and information through a comprehensive nationwide educational and information campaign.	Emphasis should be drawn upon this being a function of the National Government with collaboration from the County Government in view of Article 6 and the Fourth Schedule of the Constitution to ensure separation of power as well as coordination and cooperation of the different levels of government.	The section may require amendment to ensure separation of power in line with the Fourth Schedule to the Constitution .
	Section 6 provides that HIV and AIDS education and information dissemination shall form part of the delivery of healthcare services by	Healthcare service provision is a function of County governments hence the need to amend the provision to ensure clarity.	There is need to clarify on the role of each level of government in accordance with the Fourth Schedule of the Constitution to ensure

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	healthcare providers and the Government shall ensure training of healthcare providers’.		separation of powers.
	Section 11 (2) mandates the Minister with ensuring provision of protective equipment to healthcare providers.	Provision of protective equipment for healthcare providers depends on the function (national or county) being performed by the healthcare provider. The role of providing protective equipment is a role of county government and would vest in national government only where it relates to National Referral hospitals.	There is need for this provision to be clarified to ensure that the role of each government level is effectively undertaken
	Section 11 (3) mandates the Minister with ensuring provision of post exposure prophylaxis to healthcare providers.	Provision of post exposure prophylaxis for healthcare providers and other personnel depends on the function (national or county) being performed by the healthcare provider. The role of providing protective equipment is a role of county government and would vest in national government where it relates to National Referral hospitals.	There is need for clarity to ensure that the role of each government level is effectively undertaken.
	Section 15 mandates the Minister to ensure that facilities for HIV testing are made available.	Provision of HIV testing is a shared function of both county and national governments and not solely vested upon the Minister.	HIV testing is a shared function and Section 15 should reflect the same.
	Section 16 (1) and (2) mandates the Minister to approve testing centres and healthcare providers for testing purposes.	HIV testing is part of service delivery that is primarily carried out at the county health facilities but is also carried out at the national referral facilities and is therefore a shared function and approval of testing centres and healthcare providers is not only a preserve of the Minister. The Minister or in this regard the Cabinet	Amend to align to the functional assignment in the constitution.

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
		Secretary cannot purport to approve health facilities and healthcare providers for the county governments but can do so for the national government.	
	Section 19 mandates the government to take steps to ensure available resources and access to healthcare services including essential medicines by persons with HIV.	Access to essential healthcare services including access to essential medicines for persons with HIV or AIDS is a function which is shared between both the national and county government.	Amend to reflect the responsibility as being of the national and county governments.
	The Constitutional court declared Section 24 to be unconstitutional in <i>AIDs Law Project Vs Attorney General and 3 Others</i> [2015] eKLR Petition 97 of 2010 .	The Section was found by the court to be unconstitutional for being vague and lacking in certainty.	Repeal the Section.
Pharmacy and Poisons Board Act	Section 4 (5) provides that minutes from meetings of the Board shall be entered into a minute book and, at the next board meeting be submitted to be passed as correct and confirmed by the <i>Chairman of the Board</i> .	The decisions of the Board have a direct impact on the laws passed by the counties. Thus, these minutes should be circulated to the counties as soon as they are confirmed.	Amend to provide that, once passed as correct and confirmed as correct, the minutes of the meetings of the Board shall be circulated to the county assemblies and executives in addition to being entered into the minute book.
	Section 14 provides that appeals on decisions of the Board not to register a person as a pharmacist or to deregister a pharmacist should be made to the Supreme Court.	There is only one supreme court in Kenya thus requiring persons to appeal to the <i>Supreme Court</i> does not guarantee the provision of proximate and easily accessible services in accordance with Article 174 (f) of the Constitution .	Amend to provide that appeals against a direction of the Board to delete a name from the register should be made to the High Court. Sections 15 and 16 should also be amended such that all mentions of the supreme court are replaced with High Court.
	Sections 27 (1) and (2) provide that the decision to issue, renew	In light of the transfer of county pharmacies to the counties, this function is now a county function.	Amend to provide that the decision to issue, renew or revoke licences shall lie with

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>or revoke licences lies with the Board.</p> <p>Section 28 (1), (3) and (4) provide that applications for licences to deal in poisons by persons who carry on agricultural, horticultural or mining businesses shall be made to the Board who shall then decide whether to issue, renew or revoke these licences.</p>	<p>However, the National Government still has the power to set the standards for the issuance of licenses thus it should issue regulations to guide the counties.</p> <p>This function has been transferred to the counties thus the applications should be made to the counties. The National Government now has the function of determining the criteria that shall be used when granting, renewing or revoking a licence. Thus, it should guide the counties on the criteria to be used.</p>	<p>the county governments which shall be guided by the guidelines created by the cabinet Secretary in consultation with the Board.</p> <p>Amend to provide that applications by persons carrying on mining, agricultural or horticultural businesses for licenses to deal in poisons shall be submitted to the County governments who, guided by the guidelines prescribed by Cabinet Secretary after consultation with the Board, shall determine whether such licences should be issued, renewed or revoked.</p>
	<p>Section 32 (1), (2) and (5) empower the Board to receive applications for licenses to sell Part II poisons and to decide whether to issue, renew or revoke these licences.</p>	<p>The Act should recognise the transfer of this function to the county government and the role of the national government to give guidance to the counties on how to perform their functions.</p>	<p>Amend to provide that applications for a licence to sell Part II poisons shall be made to the county governments who shall, in accordance with the guidelines set out by the Cabinet Secretary after consultation with the Board, decide whether they shall be issued, renewed or revoked.</p>
	<p>Section 44 of the Act is silent on the issuing of rules and guidelines by the Cabinet Secretary to guide the county governments.</p>		<p>This section should include a provision for the Cabinet Secretary to issue guidelines to guide the counties on the criteria for granting, renewing or revoking the various licences provided for by the Act.</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
Pharmacy and Poisons Board Rules (Legal Notice No 86 of 1957 as amended by L.N. 443/1957, L.N. 332/1958, L.N. 426/1958, L.N. 498/1958, L.N. 550/1959, L.N. 114/1960, L.N. 587/1961, L.N. 242/1963, L.N. 631/1963, L.N. 92/1964, L.N. 365/1964, L.N. 115/1968, L.N. 125/1969, L.N. 248/1969, L.N. 41/1971, L.N. 120/1984, No. 52/1984, L.N. 51/1985, L.N. 61/2002, L.N. 91/2004 and L.N. 191/2010).	<p>The Section 3 (4) provides that where the Board denies an application for a license to import, the applicant may appeal the decision to the Minister.</p>	<p>Article 152 of the Constitution provides that the Cabinet shall now consist of Cabinet Secretaries Not Ministers.</p>	<p>Amend to remove the word “minister” and replace it with “Cabinet Secretary”.</p>
	<p>Section 4 (3) provides that where the Board denies an application for a license to export drugs or poisons, the applicant may appeal the decision to the Minister.</p>	<p>Article 152 of the Constitution provides that the Cabinet shall now consist of Cabinet Secretaries Not Ministers. The Section should therefore be amended to reflect this.</p>	<p>Amend to remove the word “minister” and replace it with “Cabinet Secretary”.</p>
	<p>Section 14 (5) provides that the person in hospitals who is charged with the inspection of the storage of poisons as well as the records regarding the issue, use and dispensing of poisons shall submit their reports on these matters to the registrar of the <i>Pharmacy and Poisons Board</i>.</p>	<p>County hospitals and pharmacies have been transferred to the county governments. It is therefore the duty of the county governments to monitor the issuing, use, and storage of poisons in county hospitals and ensure that poisons are being handled in a manner that is consistent with the law. However, because of the technical nature of this function, the counties shall need to appoint a qualified person to ensure that the Pharmacy and Poisons Act and its regulations are being followed.</p>	<p>Amend to provide that the person in hospitals tasked with carrying out the inspection of the storage of poisons and the records regarding the issue, use and dispensing of poisons shall submit their reports to the person in charge of the hospital and the county government. Also, amend to provide that the Counties, in consultation with the Board, should appoint county representatives to aid in the monitoring of the issuing, use and storage of poisons and drugs on hospitals and pharmacies.</p>
<p>Pharmacy and Poisons (Conduct of Inquiries) Rules (Legal Notice No 52 of 1985)</p>	<p>The <i>Rules</i> currently provides that the Board, shall hear complaints against registered pharmacists and make determinations based on the evidence presented. The Board is comprised only of professionals in the pharmaceutical industry-</p>	<p>To ensure that disciplinary hearings are conducted in a manner that adheres to the Bill of Rights as provided in Chapter 4 of the Constitution and other principles of justice, a lawyer/advocate may be useful during disciplinary hearings to guide the Board.</p>	<p>Consider amending to include that the Board one lawyer. Also, procedures should be put in place for the appointment and removal of such an advocate.</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	it is not a requirement that a Board member have legal experience.		
Pharmacy and Poisons (Registration of Drugs) Rules (Legal Notice No. 147 of 1981 as amended by L.N. 142/1991 and L.N. 192/2010)	No amendment required.	These rules provide the procedure and standards for the registration of drugs. This function is still a national government function thus no amendment is required.	
Pharmacy and Poisons (Control of Drugs) Rules (Legal Notice No 180 of 1969 as amended by L.N. 247/1969, L.N. 228/1974)	No amendment required.	The <i>Rules</i> stipulate that no person shall import possess, distribute, sell or purchase Part I drugs without authorisation and, where a person is authorised to import possess, distribute, sell or purchase Part I drugs, they shall do so in accordance with the Act. These rules provide guidance on the handling of Part 1 drugs thus do not require to be amended.	
Public Health Act	Section 2 defines a magistrate as a magistrate empowered to hold a subordinate court of the first, second or third class.	The division of magistrate's courts into classes was done away with by Section 5 of the Magistrates' Courts Act, 2015 . The Act should therefore be amended to reflect the new divisions of subordinate courts.	Delete and restructure to align to the laws on the structures of the judiciary. Delete Other references in the Act to subordinate courts of a certain class. These include Section 124 (5) , Section 126C (3) and Section 126D (5) and (6) .
	Section 2 defines the Minister as the minister for the time being responsible for health.	Article 152 of the Constitution provides that the Cabinet shall now consist of Cabinet Secretaries. The Section should therefore be amended to reflect this.	Amend to remove the words " <i>the Minister</i> " in all the instances they appear and replace them with " <i>the Cabinet Secretary</i> ". This amendment should be made throughout the Act.

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	Section 2 defines the drainage authority as the <i>Ministry of Works</i> or any other authority the Minister may appoint.	The term drainage authority is not used in the Act.	Delete section.
	Section 2 currently provides that health authorities, in municipalities are the municipal councils. The section also provides that the health authority, in areas that are not municipal areas is the Minister.	The function of health has been devolved to the counties.	Delete since the Health Act addresses health as a devolved function.
	Section 2 defines a medical officer of health as the <i>Director of Medical Services</i> , the duly appointed medical officer of a municipality and, with regards to any other area, a medical officer of health appointed for the area by the minister.	The Health Act (Act No 21 of 2017) , in section 16 - 17 , establishes the office of the <i>Director General of Medical Services</i> . Also, Section 19 of the created the Health Act (Act No 21 of 2017) establishes the office of <i>County Director of Health</i> which is charged with, among others, being the technical advisor to the county government on health matters.	Delete as this is it is addressed differently in the Health Act .
	Section 3 provides that there shall be a <i>Central Board of Health</i> which shall consist of Director of Medical Services, a sanitary engineer, a secretary, and six other persons, three of whom shall be medical practitioners.	Section 16 and 17 of the Health Act (Act No. 21 of 2017) replaced the office of the <i>Director of Medical Services</i> with that of the <i>Director General of Medical Services</i> . Furthermore, the Health Act (Act No. 21 of 2017) sets out the structure of the <i>National Health System</i> and <i>County Health System</i> .	Delete section.
	Section 7B (1) establishes <i>District Health Management Boards</i> which are mandated with overseeing the running of government health	The function of overseeing county health facilities has been transferred to the counties and the sub-county entities are likely to be established by way of regulations under the	Delete Section

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	institutions in the districts.	health Act or by County legislation.	
	Section 9 (1) provides for the appointment of the <i>director of medical services, the deputy director of Medical Services, assistant directors of medical services, medical officers of health, assistant medical officers of health, medical officers, pathologists, health inspectors, port health officers</i> and such other officers.	Human resources for the national and county government is now done by the governments at either level and cannot be prescribed in detail by this Act. It is an issue that is addressed in the Health Act .	Delete this section
	Section 9 (2) empowers municipal councils to appoint medical officers for the municipality with the approval or the <i>Minister of health</i> and the <i>Minister for local government</i> .	The section refers to the defunct municipal councils.	Delete this section.
	Section 10 establishes the medical department whose functions include to preventing and guarding against the introduction of infectious disease into Kenya from outside; promoting the public health and preventing, limiting or suppressing of infectious, communicable or preventable disease within Kenya; and advising and directing local authorities in regard to matters affecting the public.	Section is premised on the old structures of the centralised government. The functional assignment between the two levels of government under devolution is addressed in Sections 15 and 20 of the Health Act (Act No.21 of 2017) .	Delete.
	Section 11 empowers the Minister to cause inquiries to be made into any matter concerning	Public health has been devolved to the counties which includes looking into public health concerns	Amend to specify the public health issues which fall under the mandate of the county

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	public health in any place.	which arise at the county level.	governments and those which fall under the mandate of the national government.
	Section 14 provides for the procedure to be adopted when a complaint is made to the Central Board about the public health being endangered as a result of the municipal council's failure to perform its duty.	This procedure and the structure no longer exists under devolved governance.	Delete this section
	This section empowers the Minister in charge of local government to approve by-laws made by municipal councils, which affect public health. The Minister in charge of local government shall obtain the agreement of the Minister responsible for health before approving the by-laws.	The Procedure is no longer relevant under devolved governance.	Delete
	Section 16 provides that where there is a conflict between the Act and any other Act, the provisions of the Public Health Act will prevail.	The Health Act (Act No.21 of 2017) is the main act relating to health and the provisions of the Public Health Act are not aligned to the constitution, this provision does not make sense.	Delete this section.
	Section 32 provides that municipal councils shall build or contract for the use of hospitals or other places of reception. This shall be done with the permission of the Central Board of Health.	Section refers to non-existent structures.	Delete this section.
	Section 33 provides that the cost of maintenance of a patient who is not a pauper shall be considered a debt owed	This section is unclear given that Health is now a human right. It might need to be reviewed in view of the recognition of health as a right.	Amend to clarify this section in light of Article 43 of the Constitution . The amendment should address the issue of retention by hospitals

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	by the patient to the municipal council.		of patients who have outstanding bills. This clause is best situated in the Health Act.
	Section 34 empowers municipal councils to contract third parties for the temporary supply of medicine and medical assistance.	This section is obsolete and not aligned to devolved governance	Delete this section.
	Section 36 empowers the Minister to make rules for the handling of threats of epidemic, endemic or infectious diseases.	Section is situated in a centralised governance system.	Amend to provide that the counties shall make laws and rules for the handling of outbreak of infectious diseases and the national government shall formulate policies to guide the counties. This section is best situated in the Health Act .
	Section 51 empowers the Minister to order the examination of a person if, as a result of report from a medical officer, he believes the person is suffering from a venereal disease	This section may be in breach of health and human rights standards of patient care and may not be necessary in the modern day.	Delete this section.
	Section 67 provides that where a person from a sea vessel is suffering from an infectious disease and, on the orders of the port health official is removed to a hospital or place of isolation, the national government may recover the expenses incurred in the treatment said person from the masters of vessels from which person came.	The section may amount to a violation of rights. Communicable diseases are not managed in such a punitive manner.	Delete and redraft to provide ways of managing communicable diseases in line with the policies formulated under Section 69 (1)(i) of the Health Act

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	Section 77 empowers the Minister to set up asylums for the detention of persons with <i>Leprosy</i> .	<i>Leprosy</i> is now eliminated in Kenya.	Delete this section.
	Section 78 provides that it is an offence for one person to fail to report to the nearest magistrate another person who they suspect has <i>Leprosy</i> .	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 79 empowers magistrates to order police officers to detain persons suspected of having <i>leprosy</i> until such persons are examined in accordance with the Act.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 80 provides for the procedure to be followed to ensure the examination of a person suspected of having <i>Leprosy</i> .	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 81 provides that where a person suspected to have <i>leprosy</i> is examined and found to not have it, they shall be discharged from their detention.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 82 provides for the procedure to be followed where, after an examination, there is doubt as to whether a person suspected to have <i>leprosy</i> actually has the disease.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 83 requires that the interim reception order and the reports of the medical practitioners which led to the issuance of the order should be	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	submitted to the Minister.		
	Section 84 provides for the procedure to be followed when a person wants to voluntarily submit themselves for examination for leprosy.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 85 empowers the Minister to issue detention orders where he is satisfied that the person detained under an interim reception order is affected with leprosy	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 86 requires that where the minister is not satisfied that an inmate has leprosy, they shall forward the order and medical reports to the <i>Director of Medical Services</i> . Where the director is satisfied, they shall direct the Minister to issue a detention order. Where the director is not satisfied, they shall order the superintendent to release the person.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 87 empowers the Minister to make orders for the release of persons detained in asylums where there is sufficient reason.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 88 (1) provides that the minister shall appoint superintendents of asylums. The superintendents shall be under the supervision and direction of the director of medical services.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	Section 88 (2) provides that medical officers, attendants, guards and other officers in asylums shall be appointed by the Director of Medical Services.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 89 provides for the duties of superintendents of leprosy asylums.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 90 prohibits people with leprosy who are in asylums from interacting with the outside world.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 91 prohibits persons in asylums from leaving unless they are discharged in accordance with the provisions of the Act. It also allows for the arrest without a warrant of persons who leave asylums without being discharged.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 92 provides for the visitation of persons in leprosy asylums by friends, relatives and legal advisors.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 93 provides that the cost of erecting and establishing asylums shall be provided by parliament.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 94 provides that superintendents of asylums can, with the permission of the Minister, recover the expenses of maintaining an inmate from that inmate. It also empowers a superintendent of an asylum to enter into	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>agreements with inmates or their representatives for the erection of buildings for the inmate. The superintendents would enter these agreements on behalf of the government.</p>		
	<p>Section 95 allows the high court to appoint a manager for the property of a person who is detained in asylum. Applications for such orders shall be made by the <i>Director of Public Prosecutions</i>.</p>	<p>Leprosy is now eliminated in Kenya. This section no longer relevant.</p>	<p>Delete this section.</p>
	<p>Section 96 requires the medical officer of health who examines a person suspected of having leprosy to ensure that the house of the person is cleansed and disinfected if it is found that the person does have leprosy and needs to be isolated.</p>	<p>Leprosy is now eliminated in Kenya. This section no longer relevant.</p>	<p>Delete this section.</p>
	<p>Section 97 requires all persons who are detained in asylums to submit themselves for photographs whenever required to do so by the superintendent of the asylum. The section also makes it an offence to supply or exhibit photographs of people detained in an asylum without express authorisation.</p>	<p>Leprosy is now eliminated in Kenya. This section no longer relevant.</p> <p>Also, this section goes against a person's right to privacy as provided for in Article 31 of the Constitution as well as the right to dignity as provided in Article 29 of the Constitution.</p>	<p>Delete this section.</p>
	<p>Section 98 provides that any person who commits an offence under this part of the Act shall be liable to a fine of Kes 15,000 or an</p>	<p>Leprosy is now eliminated in Kenya. This section no longer relevant.</p>	<p>Delete this section.</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	imprisonment term not exceeding 1 year or both the fine and imprisonment.		
	Section 99 empowers the Minister to make rules to with regards to the handling of persons with leprosy, including providing for the detention of persons in asylums and the staffing of asylums.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 100 provides that where it shall cause undue delay or inconvenience to have a person suspected of having leprosy examined by two medical practitioners, the person may be examined by one medical practitioner whose report should be confirmed by a second examiner as soon as is convenient.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 101 empowers police officers to execute orders made under the <i>leprosy</i> part of the act and makes it an offence for any person to resist or obstruct the execution of any duty provided for under the Act.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 102 empowers the minister to grant exemptions to persons which allow said persons to operate private leprosy asylums.	<i>Leprosy</i> is now eliminated in Kenya. This section no longer relevant.	Delete this section.
	Section 103 provides for the definition of terms to be used in the part of the Act which provides for smallpox. It defines a public vaccinator as a	Human resources for the national and county government is now done by the governments at either level and cannot be prescribed in detail by this	Rework this section to provide for public vaccination officers within the structure of the national health system and county

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	public vaccinator appointed by the <i>Director of Medical Services</i> and any person appointed to assist a public vaccinator.	Act. It is an issue that is addressed in the health Act.	health system as they are provided for by the Health Act.
	The Section 106 provides for emergency vaccination procedures in areas that are threatened by <i>Smallpox</i> outbreaks.	Section situated in the former centralised system and the local governments.	Delete this section and address the issue in the Health Act (Act No 21 of 2017) .
	Section 111 empowers persons who are in charge of leper asylum or mental hospital or chronic sick hospital, jail, prison, reformatory, penitentiary or other similar institution to cause to be vaccinated, all persons admitted therein if they have not been successfully vaccinated in the preceding 5 years.	<i>Leprosy</i> is now eliminated in Kenya.	Amend to delete the words “ <i>leper asylum</i> ”.
	Section 112 (2) empowers the <i>Director of Medical Services</i> to instruct public vaccinators to visit schools and inspect the children attending them to establish that the children have been vaccinated against <i>Smallpox</i> .	This section is situated in the former centralised system and the local governments.	Rework this section to recognise the national and <i>County Health Systems</i> that have been set up by the Constitution and the Health Act. (Act No. 21 of 2017) .
	Section 114 (b) empowers the Minister to make rules conferring powers and imposing duties on magistrates, police and other officers to enforce the vaccination provisions of the Act.	This section is situated in the former centralised system and the local governments.	Delete this section and address the issue in the Health Act. (Act No.21 of 2017) .

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	Section 114 (c) empowers the Minister to make rules prescribing the conditions under which the <i>Smallpox</i> vaccine shall be given to medical practitioners, municipal councils and others.	This section is situated in the former centralised system and the local governments.	Delete this section and address the issue in the Health Act. (Act No.21 of 2017) .
	Section 116 provides that it is the duty of every local authority to take all practical measures to maintain cleanliness and sanitary conditions in the district.	Section situated in the former centralised system and the local governments.	Delete and address issue in the Health Act. This should also be done in Sections 126C, 26D, 129 and 144 .
	Section 119 empowers the medical officer of health to serve a notice on any person causing a nuisance (as defined by section 118) requiring the person to remove the nuisance within a specified time.	Section situated in the former centralised system and the local governments.	Delete and address the issue in light of the county health systems provided for in the Health Act. (Act No. 21 of 2017) .
	Section 120 provides for the procedure to be followed where an author of a nuisance fails to comply with a notice. The medical officer who issued the notice should lodge a complaint with a magistrate who shall then make appropriate orders.	Section situated in the former centralised system and the local governments.	Delete and address the issue in light of the county health systems provided for in the Health Act. (Act No. 21 of 2017) .
	Section 121 provides for the penalty of failing to comply with the order of a medical officer with regards to a nuisance.	Section situated in the former centralised system and the local governments.	Delete and address the issue in light of the county health systems provided for in the Health Act. (Act No. 21 of 2017) .
	Section 122 empowers the court to order a health authority to remove a nuisance if the owner or occupier of the	Section situated in the former centralised system and the local governments.	Delete and address the issue in light of the county health systems provided for in the

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	premises where the nuisance is located is unknown or cannot be found.		Health Act. (Act No. 21 of 2017).
	<p>Section 123 empowers medical officers, health authorities or any of their officers and police officer on the order of a magistrate to enter any building or premises to inspect the same for the existence of any nuisance. This inspection may include opening up the floor of the premises or building to inspect drains.</p> <p>Where it is found that there is no nuisance, the health authority is required to restore the premises at its own cost.</p>	Section situated in the former centralised system and the local governments. Also, the section does not require these officers to have probable cause to inspect a premise. Thus, this section is prone to abuse and may result in the violation of people's rights to property as guaranteed by Article 40 of the Constitution .	Delete and address the issue in light of the county health systems provided for in the Health Act (Act No. 21 of 2017) . Also, conditions for the exercise of this power should be put in place to safeguard citizens' right to property.
	Section 124 empowers the magistrate's court of the first class to make orders for the demolition of buildings where it is satisfied that the building is defectively constructed or dilapidated.	Section situated in the former centralised system and the local governments.	Amend to recognise the current system of magistrates court as provided by the Magistrate's Court Act (Act No. 26 of 2015)
	Section 125 empowers the medical department to collect data on overcrowding and insufficient housing and inquire into the methods of dealing with such issues. The department is also empowered to publish their recommendations.	This section addresses the inter- relation between poor housing condition and health but under the old system. It's an important issue that should be situated in the clauses addressing the inter-linkage between health departments and other departments at national levels.	Delete and address the issue within the Health Act .
	Section 126 provides that the Minister shall make rules and may confer powers on local authorities on various	Section situated in the former centralised system and the local governments.	Delete and address issue in the Health Act .

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>matters including inspection of land, dwellings, buildings, factories and trade premises and the keeping of animals or birds.</p>		
	<p>Section 126A empowers the municipal councils, when required to do so by the Minister for Local government with the agreement of the <i>Minister for health</i>, to make by laws on buildings and sanitation.</p>	<p>Section situated in the former centralised system and the local governments.</p>	<p>Delete and address issue in the Health Act.</p>
	<p>Section 126B provides that, where by-laws made by municipal councils under Section 126A are unreasonable, the local authority may, with the consent of the Minister, relax them.</p>	<p>Section situated in the former centralised system and the local governments.</p>	<p>Delete and address issue in the Health Act.</p>
	<p>Section 126C empowers local authorities to reject plans of work that are not in accordance with building by-laws made by municipal councils. Where there is a dispute over rejected plans, either the local authority or the person who lodged the plans may apply to a magistrate's court of the first class.</p>	<p>This section addresses the inter- relation between poor construction practices and health but under the old system. It's an important issue that should be situated in the clauses addressing the inter-linkage between health departments and other departments at national levels.</p>	<p>Delete and address the issue within the Health Act.</p>
	<p>Section 126D provides the procedure to be followed when construction works are in contravention of building by-laws.</p>	<p>This section addresses the inter- relation between poor construction practices and health but under the old system. It's an important issue that should be situated in the clauses addressing the inter-linkage between health departments and other</p>	<p>Delete and address the issue within the Health Act.</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
		departments at national levels.	
	<p>Section 127 empowers medical officers to determine the materials which shall be used to construct buildings used to store food stuffs. Where such a building is not constructed in accordance with the medical officer's direction, the medical officer may enter the premises and cause the necessary works to be done at the cost of the building owner.</p>	<p>This section addresses the inter- relation between poor food storage practices and health but under the old system. It's an important issue that should be situated in the clauses addressing the inter-linkage between health departments and other departments at national levels.</p>	<p>Delete and address the issue within the Health Act.</p>
	<p>Section 130 provides that the Minister, on the advice of the Central Health Board shall make rules for the protection of water supplies.</p>	<p>Section situated in the former centralised system and the local governments.</p>	<p>Delete and address issue in the Health Act.</p>
	<p>Section 131 empowers medical officers of health, veterinary officers, sanitary inspectors, meat inspectors to seize tainted or unwholesome food which is to be sold and, upon application to a magistrate, destroy the same.</p>	<p>Section situated in the former centralised system and the local governments.</p>	<p>Delete and address issue in the Health Act.</p>
	<p>Section 132 empowers medical officers of health and persons so authorised by a health authority to enter any premises used for the sale, preparation or storage of food and seize any unwholesome foods found therein and, upon application to a magistrate, destroy the same.</p>	<p>Section situated in the former centralised system and the local governments.</p>	<p>Delete and address issue in the Health Act.</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>Section 134 provides that the Minister shall make rules for the protection of food.</p>	<p>Section makes sense on food safety but should provide this in national legislation and regulations while the county governments can also make implementation laws and regulations.</p>	<p>Amend to provide that the Cabinet Secretary shall formulate policies for the protection of food including the inspection of cattle, stock and dairy produce and fixing standards for dairy products and the storage of food. The county governments shall then enact county laws to implement these policies.</p>
	<p>Section 135 empowers the Minister, with the advice of the Board to make rules for the protection of food. These include prohibiting registration of dairy farmers and ordering the inspection of premises where dairy and meat products are produced and kept.</p>	<p>It is the duty of the counties to ensure the safety and hygiene of food and places where it is produced, obtained or sold. The making of orders to protect food is thus a county government function.</p>	<p>Delete and re-draft to provide for county implementation of the national standards on food safety</p>
	<p>Section 135A (1) and (2) provide that the municipal councils, with the approval of the Minister may make by-laws to regulate the production, preparation, storage and sale of milk and milk products. These by-laws shall be passed in accordance with the Local Government Act.</p>	<p>The function of regulating the production and preparation of food which includes dairy and dairy production should be performed by the county government as it is part of the food safety and control function.</p>	<p>Delete and re-draft to provide that the county government shall laws to regulate the production, preparation, storage, certification and sale of milk and milk products.</p>
	<p>Section 140 requires owners of cesspits to ensure that they are protected or screened so as to prevent the entry and breeding of mosquitoes therein. This screening must be done to the satisfaction of a medical officer.</p>	<p>While this is an important provision in so far as the prevention of malaria is concerned, its implementation is situated in the former centralised system and the local governments.</p>	<p>Delete and address issue in the Health Act</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>Section 141 empowers medical officers of health to direct owners of gutters, pipes, grooves or waterways to drill holes into said gutters, pipes, grooves and waterways at least every 2 feet so as to prevent the accumulation of water.</p>	<p>While this is an important provision in so far as the prevention of malaria is concerned, its implementation is situated in the former centralised system and the local governments.</p>	<p>Delete and address issue in the Health Act</p>
	<p>Section 142 empowers the <i>Director of Medical Services</i>, persons authorised by him or medical officers of health to destroy immature stages of mosquitoes when the same are found on in any collection of water.</p>	<p>While this is an important provision in so far as the prevention of malaria is concerned, its implementation is situated in the former centralised system and the local governments.</p>	<p>Delete and address issue in the Health Act</p>
	<p>Section 144 (1) provides that the Minister has the duty of selecting sites to be used as cemeteries and that burials shall be conducted in accordance with rules made by the local authority.</p>	<p>The section is good but situated in the former system of government. The function of establishing and managing cemeteries was devolved to the county governments. Thus, the county government should select sites for cemeteries and make laws to provide for burials.</p>	<p>Delete and re-draft to provide that the county government shall select sites to be used as cemeteries and that burials shall be conducted in accordance with county laws.</p>
	<p>Section 145 defined authorised cemeteries as cemeteries authorised by the Minister.</p>	<p>Cemeteries are now under the control of the county governments.</p>	<p>Amend to provide that authorised cemeteries are cemeteries authorised by the relevant county government.</p>
	<p>Section 146 (3) provides that permits to exhume bodies or the remains of bodies shall be granted by the Minister.</p>	<p>Permits for exhumation should be granted by the county government because cemeteries are under the control and management of the county governments.</p>	<p>Amend to provide that a permit to exhume a body or the remains of any body from a cemetery shall be granted by the county government.</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	Section 147 (1) only allows the Minister to make an order for exhumation of a body to enable the execution of public works.	The county government is tasked with county transport and county public works while the national government is tasked with the construction and operation of national roads. Both levels of government therefore need the power to order exhumations for the execution of public works.	Amend to clarify the instances in which applications for exhumation orders should be made to the Cabinet Secretary and the instances in which they should be made to the county government.
	Section 149 provides that the Minister can close cemeteries.	The establishment and management of cemeteries is a county function thus, orders to close a cemetery should come from the county government not the Cabinet Secretary.	Amend to provide that the county government shall have the power to close any cemetery.
	Section 150 empowers the board to recover expenses incurred in the execution of an order that was requested by a person from the person in question.	The section is good but situated in the former system of government.	Delete and re-draft to align to devolved government.
	Section 152 requires all persons who wish to open lodging houses to obtain a licence for the same from a local authority.	The section is good but situated in the former system of government.	Delete and re-draft to align to devolved government.
	Section 153 (2) empowers the <i>Director of Medical Services</i> to authorise a medical practitioner to visit and inspect nursing homes, convalescent homes, private hospitals, private mental hospitals, maternity homes, infirmaries or any institutions where invalids, convalescents or children are treated. While Section 153 (3)	The section is good but situated in the former system of government.	Delete and re-draft to align to devolved government.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	makes it an offence to obstruct such an inspection.		
	Section 153 (3) provides for instances where the Central Board may refuse to grant a licence to operate a nursing homes, convalescent home, private hospital, private mental hospital, maternity home, infirmary or any other institution where invalids, convalescents or children are treated	The function of granting licences is a county government function.	Amend to provide that licences shall be granted by county governments in accordance with the rules set for the same by the national government.
	Section 155 provides that where, in the opinion of a local authority, a public latrine is required, the authority shall apply to the Minister for permission to erect it.	The section is good but situated in the former system of government.	Delete and re-draft to align to devolved government.
	Section 156 empowers local authorities to prohibit the washing of clothes in places not appointed for such purposes.	The section is situated in the former system of government.	Delete and re-draft to align to devolved government.
	Section 157 provides that the Minister, where advised as such by the Central Board, may prohibit the use of irrigation to grow of crops within a township or within three miles of the boundaries of a township.	The section is good but situated in the former system of government.	Amend to provide that the county government can, where necessary, prohibit the use of irrigation to grow crops within the boundaries of a city, town or municipality or within 3 miles of the boundaries of a city, town or municipality.
	Section 157 (2) provides that the Minister shall make rules on the collection of standing water, to provide for the draining of standing water and to the inspection repair and	The section is good but situated in the former system of government. Prevention of waterborne diseases is a part of primary healthcare thus a function for the county government. Although, when passing	Amend to provide that the county government may pass laws regarding these issues. These laws should be made in accordance with national public health policies and the

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	cleaning of channels, canals and drains.	laws on public health, the counties should be guided by national policy.	relevant national legislation.
	Section 159 empowers the <i>District Commissioner</i> , the <i>Central Board of Health</i> , a <i>Local Authority Officer</i> , a <i>Medical Officer of Health</i> or a <i>Sanitary Inspector</i> to authenticate orders or notices made under the Act.	The <i>Office of the District Commissioner</i> does not exist in the current government.	Delete and re-draft to align to devolved government.
	Section 161 empowers <i>Director of Medical Services</i> to authorise the <i>Deputy Director of Medical Services</i> , any assistant director of medical services, medical officer of health, port health officer or medical officer of the department to perform his functions set out under the Act. It also empowers the <i>Director of Medical Services</i> and the <i>Deputy Director of Medical Services</i> to perform the functions of the <i>Director of Medical Services</i> , the <i>Deputy Director of Medical Services</i> or any assistant director of medical services or medical officer provided under the Act.	The section is good but situated in the former system of government.	Delete and re-draft to align to devolved government.
	Section 163 (1) empowers any medical officer of health or health inspector, district surgeon or port health officer, or any police officer of or above the	The section is good but situated in the former system of government.	Delete and re-draft to align to devolved government.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	rank of Inspector, or any other person generally or specially authorized in writing by the <i>Director of Medical Services</i> to enter onto a premise and inspect in the performance of any of the duties given to them under the Act.		
	Section 167 empowers health authorities or any persons authorised by them to prosecute any cases which may arise from contravention of the Act.	The section is practical given the technical nature of offences under the Act but situated in the former system of government.	Delete and re-draft to align to devolved government.
	Section 168A (1) empowers municipal councils to, with the approval of the minister, make by-laws for the prevention of breeding of mosquitoes and flies.	The section is good but situated in the former system of government Prevention of malaria and other such diseases is a county function thus the passing of the relevant laws should be done by the county government. Urban area and city boards should help in the implementation of these laws.	Amend to provide that the county government may make laws for preventing the breeding of mosquitoes and flies. These laws should then be enforced by urban areas and city boards.
	Section 169 empowers the Minister to make rules to aid in the implementation of the Act.	The section is situated in the former system of government.	Amend to provide that the Cabinet Secretary has the power to make policy for the carrying out of the purposes of the Act and the county governments may pass county legislation and regulations to effect the implementation of the national policies and laws.
Public Health Act interphase with the Health Act			Harmonise the Public health and the health Act by lifting the remnant of the clauses of the public Health Act into the Health Act.

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
Mental Health Act Cap 248	<p>Section 73 of the Health Act, 2017, provides for the enactment of legislation on Mental Health to cover the following areas:</p> <ul style="list-style-type: none"> a) protect the rights of any individual suffering from any mental disorder or condition; b) ensure the custody of such persons and the management of their estates as necessary; c) establish, manage and control mental hospitals having sufficient capacity to serve all parts of the country at the national and county levels; d) advance the implementation of other measures introduced by specific legislation in the field of mental health; and e) ensure research is conducted to identify the factors associated with mental health. 	<p>Although the Mental Health Act, Cap 248 addresses to a large extent (a) and (b) it does not address (c) in so far as county level is concerned. There is an erroneous assumption that mental health care is national government function.</p> <p>The Act is also not clear on how it addresses (d) which is in itself vague. Further it does not address (e) whatsoever.</p>	<p>The Act should be reviewed to capture the provisions of Section 73 (Part IX) of the Health Act, 2017.</p> <p>There should be an option of repealing all the provisions on mental health in the health Act and comprehensively addressing the mental health concerns in one this Act.</p> <p>The assumption that mental health services are the business of the national government is erroneous- mental health care services should be integrated in county health care services</p>
	<p>Section 2 refers to offices that do not exist under the current system of government for example Ministers.</p>	<p>The Constitution of Kenya, 2010 provides for Cabinet Secretaries and not Ministers and thus should be reviewed to ensure it complies with Article 152 of the Constitution.</p>	<p>Amend to correct the error</p>
	<p>Section 4 establishes the Kenya Board of Mental Health and lists the membership to the board. The board and its constitution should be reviewed to ensure that the functions are limited</p>	<p>Review to amend various terminologies including Minister which no longer exists as per the Constitution.</p>	<p>Amend to limit the Board to be a preserve of the functions of National Government only since it's intended to be a national government entity.</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	to setting standards and to the National Government.		
	Section 4 of the Act establishes the Board however is silent on its composition. Article 27 (8) of the Constitution provides that not more than $\frac{2}{3}$ of the members of the elective or appointive bodies shall be of the same gender.	Whenever any public body is set up, it is important to provide for the requirement that the minimum constitutional requirements on gender and inclusion are provided.	Amend to require that the Two-third gender and inclusion on regional balance and other criteria are considered.
	Section 5 provides for the functions of the <i>Kenya Board of Mental Health</i> including among others “ <i>coordinating mental health care activities in Kenya and approve establishment of mental hospitals.</i> ”	The functions should be limited to National Government run mental hospitals to avoid any conflict with county governments. Counties have also established their own health boards that manage county hospitals and county referral hospitals and the Act provides no clear linkage between the <i>Kenya Health Board</i> and other Boards at the county levels.	Amend to limit the functions of the Board to the functions assigned to the National Government under the Fourth Schedule to the Constitution .
	Section 7 provides for the appointment of mental health councils in the districts.	The Constitution of Kenya 2010 provides for different administrative structures under devolution. The District is no longer a structure under the devolved system. The Act does not recognize the different roles of the two levels of government. The national government is responsible for the <i>National Mental Health Referral Facility (Mathare Mental Hospital)</i> but the county government is also responsible for county health services which includes mental health.	Amend to take cognizance of the devolved system of government in line with the Constitution of Kenya 2010 . Amend clauses that make reference to districts. The same will apply to other sections in the Act that make reference to district mental health council including Section 22 (4) .

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
		<p>Article 6 of the Constitution also provides for the distinct and inter-dependent roles of the national and county governments. This section should thus be amended to incorporate the shared function of mental health.</p>	
	<p>Section 8 provides for the expenses of the board and the district mental health councils.</p>	<p>The Constitution provides for a new form of administrative structure. A review of the formation/constitution of health councils if necessary would also address the expenses of such a body/bodies.</p>	<p>The provision should be amended to address the abovementioned concern on district mental health councils as provided in section 7 above.</p>
	<p>Section 9 provides for the establishment of mental hospitals, a preserve of county and national government departments.</p>	<p>The section provides for the authorization of the establishment of mental hospitals. The act should be amended to limit the role of the board to an advisory role.</p> <p>The function of establishment should be the preserve of national and county governments and particularly the departments in charge of health. This is because the respective government department has the development plan which may not be with the board.</p>	<p>This section should thus be deleted or reviewed to ensure that the board is assigned an advisory as opposed to an approval role.</p>
	<p>Section 10 (1) provides that <i>“any person who has attained and apparent age of sixteen years, who desires to voluntarily submit himself to treatment for mental disorder and who makes to the person in charge a written application in duplicate in the form prescribed, may be received as a</i></p>	<p>The Constitution defines a child as any person below the age of 18 years. In line with this definition therefore a child at 16 years of age should not be allowed to voluntarily submit themselves for mental treatment.</p>	<p>The Act should be amended to revise the age of an individual to voluntarily submit themselves for treatment for mental disorder from 16 to 18 years, as an individual of 16 years is still a child within the definition of the Constitution and has thus not attained the age of consent.</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p><i>voluntary patient into a mental hospital.”</i></p>		
	<p>Section 20 (1) provides that the Minister may, after consultation with the Minister for the time being responsible for finance by notice in the Gazette, prescribe the fees payable for admission of persons into Governmental mental hospitals under this part and the manner of payment of such fees.”</p> <p>Similarly, Section 20 (2) which provides that a non-government mental hospital admitting persons under this Part may charge such fees and in such manner as the Minister for the time being responsible for finance may from time to time approve in writing.”</p>	<p>The section refers to ‘Minister’ instead of ‘Cabinet secretary’.</p> <p>The section does not respect the functional assignment of the two levels of government with different roles in so far as mental health is concerned. It assigns county functions to a national government entity.</p>	<p>Amended to Cabinet Secretary where it refers to Minister</p> <p>Delete aspects where the national government officer is being assigned county functions</p>
	<p>Section 23 (1) provides that “any person detained in a Government mental hospital under this Act may be transferred by order of the Director from one Government mental hospital to another.”</p>	<p>This provisions fails to realize the devolved system of government and therefore fails either to:</p> <ul style="list-style-type: none"> (i) limit this transfer to Government mental hospitals ran by National Government or:- (ii) provide for a consultative process that allows for transfers from National to County ran hospital or between County ran mental hospitals. 	<p>The act should be amended in recognition of the two levels of Government which may each establish mental hospitals as noted.</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	The Act has not adequately addressed the human rights concerns relating to mental health.		Review the <i>UN Committee</i> recommendations on mental health and human rights and include the rights approached in mental health care.
Mental Health Act (Board Meetings) Regulations, 2000.	Regulation 4 (4) provides that “the quorum for the conduct of the business of the Board shall be nine members.”	The membership of the board including the Chairperson and excluding the co-opted members is 9 members as provided in Section 4 of the Mental Health Act. The quorum may pose a challenge where all the members have to be present at every meeting. This would also avoid any contradiction that may arise if Regulation 4 (4) is read together with Regulation 4 (8) which provides that “subject to sub- Regulation (4) , no proceedings of the Board shall be invalid by reason only of a vacancy among the members thereof.	The regulations should be reviewed to reduce the number for the quorum required for the conduct of business.
	Sub-Regulation 5 provides that in the event of the absence of chairman the vice-chairman will preside over the meeting.	Sub-Regulation 5 should be amended to provide for gender balance between the chairman and the vice-chairman.	Amend to provide that the vice-chairman should be of a different gender to the chairman. Use language that respects gender balance is the drafters are agreeable.
	The regulations are silent on the role and the relationship between the co-opted members and the board members as provided in section 4 of the Act.		The regulations should thus be amended to factor in the provision of section 4.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
<p>Anatomy Act (Cap 249)</p>	<p>Section 3 empowers the Minister to grant licences to practice anatomy to medical practitioners and officers, teachers of anatomy or students in schools of anatomy.</p>	<p>The office of Minister has been replaced by the office of Cabinet Secretary under Article 152 (1)(D) of the Constitution.</p> <p>Furthermore, the function of granting licences has been devolved to the county governments. The function of the national government is to guide the counties by setting standards by stipulating criteria for the granting of licences.</p>	<p>Amend to provide that the Cabinet Secretary shall issue guidelines which stipulate criteria for the granting of licences for the practice of anatomy and the county government shall, in accordance with these guidelines, grant licences to medical practitioners and officers as well as teachers of anatomy and students in schools of anatomy.</p> <p>Replace the word “Minister” wherever it appears with the words “Cabinet Secretary”.</p>
	<p>Section 6 provides that the Minister may grant authority to the <i>Commissioner of Prisons, Director of Medical Services, a Medical Officer</i> concerned with a public hospital or an officer in charge of a prison to anatomically examine the body of any person who dies in a prison or public hospital or institution.</p>	<p>Under the devolved system, county hospitals and health facilities are under the mandate of the county governments. Only national referral health facilities are under the national government. The Section should therefore differentiate between the two levels of health facilities.</p> <p>The <i>Office of Director of Medical Services</i> was replaced by the office of the <i>Director General for Health</i> by the Health Act (Act no 21 of 2017).</p>	<p>Amend to provide that the Cabinet Secretary shall grant authority to anatomically examine the body of a deceased person where the person dies in a national referral health facility or a prison. However, where the person dies in a county health facility, the authority to anatomically examine their body shall be sought from and granted by the county government.</p> <p>Replace the words “Director General” with “Director General for Health.”</p>
	<p>Section 10 (1) sets out the conditions that need to be met before the body of a dead person can be removed from the place where the person died. They include giving 24 hours’ written notice of the</p>	<p>Under the devolved system, each county has a director of health who is supposed to supervise health services in the county which include anatomical examinations.</p>	<p>Amend to state that, the written notice of intended examinations shall be given to the relevant <i>County Director of Health</i>.</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	intended examination to the Director of Medical Services.		
	Section 11 requires all persons who receive the body of a deceased person for examination to deliver a return detailing the particulars of the deceased and the details of the examination as well as the death certificate of the deceased person to the Director of Medical Services.	Under the devolved system, each county has a director of health who is supposed to supervise health services in the county which include anatomical examinations.	Amend to provide that the return and the death certificate should be submitted to the <i>County Director of Health</i> .
	Section 12 (2) requires a person who receives a body for anatomical examination to notify the Director of Medical Services within 6 weeks of the cremation or interment of the body.	Under the devolved system, each county has a director of health who is supposed to supervise health services in the county which include anatomical examinations.	Amend to provide that the notice of the cremation or interment should be given to the <i>County Director of Health</i> .
	Section 13 enables the <i>Director of Medical Services</i> to authorise the removal of a dead body or part thereof for educational, scientific or research purposes.	The licensing of persons to handle dead bodies for scientific, educational or research purposes is a county function as it is part of licensing and accreditation of healthcare providers.	Amend to provide that the authorisation of the removal of a dead body or part thereof for educational, scientific or research purposes shall be granted by the <i>County Director of Health</i> in accordance with the criteria specified for granting such authority by the <i>Director-General of Health</i> .
	Section 14 empowers the <i>Director of Medical Services</i> to enter or authorise others to enter a school of anatomy to inspect a dead body or to collect information from a persons who has authorised the anatomical examination	Under the devolved system, each county has a director of health who is supposed to supervise health services in the county which include anatomical examinations.	Amend to provide that authorisation to enter a school of anatomy to inspect a dead body or collect information shall be issued by the <i>County Director of Health</i> .

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	of a dead body or carried out the examination themselves.		
	Section 15 empowers the Minister for Health to authorise the dispatch from Kenya and reception by Kenya of a dead body for anatomical examination. It also empowers the <i>Director of Medical Services</i> to authorise a person to receive a dead body for the purposes of either dispatching the body to a foreign country or conveying them to an approved school of anatomy.	The office of Minister was replaced by that of Cabinet Secretary in accordance with Article 152 of the Constitution . The <i>Office of Director of Medical Services</i> was replaced by the office of the Director General for Health by the Health Act (Act no 21 of 2017) .	Replace the word “Minister” with the words “ <i>Cabinet Secretary</i> ” wherever they appear in the section. Also, replace the words “ <i>Director of Medical Services</i> ” with the words “ <i>Director General for Health</i> ”.
	Section 16 empowers the Minister to make regulations.		Amend to include the formulation of guidelines to guide counties with regards to the issuance of licences for anatomical examination.
	There are no complete copies of the Act available online. In all available copies the following sections are incomplete: Sections 3 (3)(b), 11 (1)(b) and 14 (1)(a) .		Provide the public with complete copies of the Act.
Narcotic Drugs and Psychotropic Substances Act (Act No. 4 of 1994)	Section 2 does not include a definition for the term “ <i>Minister</i> ”.	The Act gives many powers and functions to the Minister but does not specify the Minister being referred to. In Part V , however, the Act specifies that the Minister referred to in that part is the <i>Minister for Health</i> . Article 152 of the Constitution replaced the office of Minister with that of Cabinet Secretary.	Amend to specify the Cabinet Secretary referred to in the Act. Replace the word “ <i>Minister</i> ” wherever it appears in the Act with the words “ <i>Cabinet Secretary</i> ”.

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>Section 7 provides for the forfeiture of land (both government land and land that is not government land) which is used for the cultivation of prohibited plants.</p>	<p>The Constitution only recognises 3 classifications of land: public land, private land and community land. The act needs to be amended to recognise this.</p>	<p>Amend to align to the constitution and specify whether the land shall be forfeited to the national government, a county government or a community.</p> <p>Consider the rights and freedoms in Chapter 4 of the Constitution and consider revising the penalty.</p>
	<p>Section 10 (4) and (5) make reference to the “Commissioner of Lands”.</p>	<p>The <i>National Land Commission</i>, as created by Article 67 of the Constitution and the National Land Commission Act (Act no. 5 of 2012) is now headed by a chairperson and has different functions from the previous commission.</p>	<p>Amend to replace “Commissioner of Lands” with “Chairperson of the National Land Commission”.</p> <p>Amend to ensure consistency with the functions of the <i>National Land Commission</i> as provided by the National Land Commission Act (Act No. 5 Of 2012).</p> <p>These amendments should be made throughout the Act. Including Section 11.</p>
	<p>Section 11 provides for the power of entry into land (both government land and land that is not government land) where an authorised officer suspects that a prohibited plant is being cultivated.</p>	<p>Under the current constitutional dispensation, land is classified into private land, public land and community land. The classification of government land and land that is not government land has been done away with.</p>	<p>Amend to provide for the procedures for entry for all 3 classifications of land. These procedures should put in place checks and balances which safeguard the right to privacy and the right to property (Article 31 and article 40 of the Constitution, respectively).</p>
	<p>Section 14 makes it an offense for a person who, for the treatment of any disorder, is supplied with/has a prescription for a</p>	<p>Article 36 (1) and Article 38 of the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol as well as Article 20 and Article 22 (1) of the</p>	<p>Amend to provide for different penalties when the person receives the additional narcotic drugs or psychotropic</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>narcotic drug or psychotropic substance and receives additional narcotic drugs or psychotropic substances from another medical practitioner or dentist without disclosing their initial supply. This offence attracts a fine of at least Kes 50,000 and imprisonment for a term not exceeding 10 years.</p>	<p>Convention on Psychotropic Substances of 1971 call on party states to rehabilitate drug abusers and to adequately punish serious drug offences particularly using imprisonment.</p>	<p>substances for: personal use; and for other purposes.</p>
	<p>Section 16 empowers the Minister to establish a board to oversee and regulate the importation, exportation, diversion, sale, manufacture, production and distribution of narcotic drugs.</p>	<p>The office of “Minister” has been replaced with that of “Cabinet Secretary” by virtue of Article 152 of the Constitution.</p> <p>This function has been duplicated in the Pharmacy and Poisons Act (Cap 244) which creates the <i>Pharmacy and Poisons Board</i>. The functions of the Board include overseeing and regulating the manufacture, importation, exportation, sale etc. of poisons which include cannabis, opiates and other narcotic drugs and psychotropic substances. The Board is supported in this role by the <i>National Drug Quality Control Laboratory</i>. The duplication of this role is an inefficient use of resources which goes contrary to Article 232 (1)(b).</p> <p>Furthermore, the function of issuing of licences for manufacture, production and distribution of narcotic drugs and psychotropic substances is a county function although the national government has the mandate to issue guidelines to guide the counties.</p>	<p>Amend and harmonise both the Narcotic and Psychotropic Substances Act (Act No. 4 of 1994) the Pharmacy and Poisons Act (Cap 244) such that only one body is mandated with the function of setting standards for regulating the manufacture, production and distribution of narcotic drugs and psychotropic substances. This same body should be empowered to regulate the importation and exportation of such drugs.</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
		It is however, a national function to oversee and regulate the importation and exportation of narcotic drugs and psychotropic substances.	
	Section 19 provides that where a person is found in possession of narcotic drugs or psychotropic substances in contravention of the Act, the narcotic drugs and psychotropic substances shall be forfeited to the government.	The Fourth Schedule of the Constitution provides that the control of drugs is a county function. However, criminal law and the police force are under the national government. There is need to clarify the role of each level of government with regards to apprehension of drug users, traffickers and manufacturers, confiscation drugs as well as receiving forfeited drugs. This will prevent conflict between the levels and duplicate allocation of resources.	Amend to clarify the roles of the county government and national government when it comes to controlling drugs, specifically the forfeiture of narcotic drugs and psychotropic substances that are held in contravention of the Act. These amendments shall affect the forfeiture orders made under Section 42 and effected in accordance with Section 43 of the Act.
	Section 20 provides for the forfeiture of all conveyances, implements and utensils used for the commission of offences under the Act to the government.	The Fourth Schedule of the Constitution provides that the control of drugs is a county function. However, criminal law and the police force are under the national government. There is need to clarify the role of each level of government when it comes to apprehension of drug users, traffickers and manufacturers, confiscation drug paraphernalia as well as receiving forfeited drug paraphernalia. This will prevent conflict between the levels and duplicate allocation of resources.	Amend to clarify the roles of the county government and national government when it comes to the forfeiture of drug paraphernalia used for commission of offences under the Act. These amendments shall affect the forfeiture orders made under Section 42 and effected in accordance with Section 43 of the Act. Consider harm reduction programmes for rehabilitating drug users and exempt these from these provisions.
	Section 52 empowers the minister to establish rehabilitation centres.	The function of establishing and operating rehabilitation centres is now a county function. The role of the national government is to	Amend to provide that a county government shall establish as many rehabilitation centres as it sees is necessary and

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
		provide policies and guidelines to aid the counties.	the Cabinet Secretary for health shall provide guidelines for the establishment and operation of these centres.
	<p>Section 53 establishes the rehabilitation fund.</p> <p>Section 54 establishes a board which shall administer the fund.</p> <p>Section 55 provides for the management of the fund.</p>	The purpose of the fund is to cater to the costs of establishing and running rehabilitation centres. The function of establishing and running rehabilitation centres is now a function of the counties and thus, should be funded as all other county functions.	Delete these sections in their entirety. Consider including in respective county government laws.
	<p>Section 57 sets out the mandate of the <i>Advisory Council for the Rehabilitation of Narcotic Addicts</i> as advising the Minister on matters relating to the administration of rehabilitation centres and the care, treatment and rehabilitation of drug addicts.</p>	The function of the national government, when it comes to rehabilitation centres is limited to creating policy and setting national standards to guide the counties. This needs to be clear in the provisions of the Act.	Delete and consider reformulating to constitute a council with limited functions of the national government. In the alternative consider establishing an intergovernmental institution with the concurrence of the county and national governments.
	<p>Section 67 empowers the Minister, in consultation with the Minister for the time being responsible for matters relating to Health, to designate analysts for the purpose of enforcing the Act.</p>	<p>The section is not specific about which Cabinet Secretary, in addition to the Cabinet Secretary responsible for health, will appoint analysts. This needs to be clarified.</p> <p>The section is not clear about the number of analysts who shall be appointed. In the spirit of decentralising state functions and services (Article 174 (1)(h) of the Constitution), there should be at least one analyst designated for each county.</p>	Amend to take into account that the function is shared. Provide for analysts at county levels. Determine mandates for either level of government.

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>Section 71 provides for the inspection of premises and places where narcotic drugs or psychotropic substances are lawfully being produced, manufactures, sold, distributed or otherwise being dealt with.</p>	<p>There are already provisions in the Pharmacy and Poisons Act for the inspection of such places by persons who are qualified to assess the quality of the drugs. The Pharmacy and Poisons Act only allows police officers who are above the rank of superintendent to carry out inspections. While the Narcotic Drugs and Psychotropic Substances Act is not specific.</p> <p>The Section allows police officers to inspect such places and seize and detain stock that is not up to standard. It is not guaranteed that all police officers will be qualified to determine which drugs are below standard, thus, to ensure efficient use of resources, police officers who carry out inspections should be accompanied by authorised and qualified persons.</p>	<p>Amend to harmonise with the provisions of the Pharmacy and Poisons Act.</p> <p>Amend to provide that where the inspection of such premises is carried out by a police officer such officer is accompanied by an analyst, inspector drugs or such other person who is qualified to determine whether the drugs are below standard or unfit for use.</p>
	<p>Section 72 empowers police officers to stop and search persons who they have reasonable cause to suspect are in possession of or are removing narcotic drugs or psychotropic substances in contravention to the Act. The section also allows police to search vehicles, aircrafts and ships. In the course of these searches, the police may use as much assistance and force as may be reasonable.</p>	<p>This section does not define “reasonable cause”. Thus, it gives the police unchecked discretion to search persons and their vehicles. This is contrary to the right to privacy which is provided for in Article 31 of the Constitution.</p>	<p>Amend to define situations or circumstances which amount to “reasonable cause” so that the police do not have unchecked discretion when searching persons and vehicles.</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>Section 84 (2) (a)-(h) and (l) mandate the Minister to make regulations to prescribe the standards and regulations for the possession, sale, supply, importation, exportation, storage, packing narcotic drugs and psychotropic substances.</p>	<p>The Act is not specific as to the Cabinet Secretary being referred to in this section. Furthermore, the Pharmacy and Poisons Act empowers the Cabinet Secretary for health to make regulations with regards to these issues. This lack of clarity and duplication of functions may result in conflict and duplication of efforts.</p>	<p>Delete these sections.</p>
	<p>Section 88 (2)(i) tasks the Minister with prescribing the form for an application for removal licence, the removal licence itself and the fees which should accompany an application for a removal licence.</p>	<p>There is no mention in the act of a removal licence prior to this section.</p>	<p>Delete this section</p>
<p>Narcotic Drugs and Psychotropic Substances (Control) Restraint And Forfeiture) Regulations, 1997 (L.N. 547/1997)</p>	<p>Section 1 (1) empowers the Attorney General to apply to the court for a restraint order where the AG has reasonable grounds to believe a person has committed a specified offence (an offence under Section 3-6 of the Act).</p>	<p>The function of public prosecution is now carried out by the <i>Director of Public Prosecutions</i> in accordance with Article 157 of the Constitution. Given that applying for a restraint order is part of the prosecution process under the Act, this function should be carried out by the DPP not the AG.</p> <p>Furthermore, the Act, under Section 22, states that it shall be the responsibility of the DPP to apply for restraint orders.</p>	<p>Amend to provide that the <i>Director of Public Prosecutions</i> shall apply for restraint orders where necessary.</p>
<p>Narcotic Drugs and Psychotropic Substances (Control)(Seizure, Analysis and Disposal) Regulations, 2006 (L.N. 16/2006)</p>	<p>Section 4 (3) requires the Seizures Registrar, upon receipt of seized substances, to notify the Attorney General and furnish the AG with the seizure report.</p> <p>Section 4 (4) provides that the AG shall not be required as a witness</p>	<p>The function of public prosecution is now carried out by the <i>Director of Public Prosecutions</i> in accordance with Article 157 of the Constitution. As such, notification of a seizure and the seizure report itself should be sent to the DPP not the AG.</p>	<p>Amend to replace the words “Attorney General” wherever they appear in the sections, with the words “<i>Director of Public Prosecutions</i>”.</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	merely because he has been notified of a seizure and provided with a copy of the seizure report.		
	<p>Section 13 requires the Attorney General to apply to a magistrate for destruction orders where n accused person cannot be identified or located or is not in Kenya.</p> <p>Section 14 provides the matters to be considered by a magistrate before issuing a destruction order.</p>	The function of public prosecution is now carried out by the <i>Director of Public Prosecutions</i> in accordance with Article 157 of the Constitution . As such, it is the mandate of the DPP to make applications for destruction orders.	Amend to replace the words “Attorney General” wherever they appear in the sections, with the words “Director of Public Prosecutions”.
<p>Public Health Officers (Training, Registration and Licensing) Act (Act No 12 of 2013)</p>	<p>Section 3 (3) provides for the composition of the <i>Public Health Officers and Technicians Council</i>. The Council consists of a <i>chairperson</i>, the <i>Director of Medical Services</i>, the <i>Chief Public Health Officer</i>, a representative from the Ministry responsible for urban areas and cities, a public health officer from a local authority among others.</p>	The offices referred to existed under the old governance system.	<p>Amend to align with the structures of devolved governance and the offices established by the Health Act (Act No 21 of 2017) and the national and county health systems set out therein.</p> <p>Also, as a public body, the council must adhere to the two thirds gender rule in its composition Provided in Article 27 (8) of the Constitution. Provide a clause to facilitate compliance in the nominations.</p>
	<p>Section 3 (4) requires the members of the council to appoint a vice-chairperson.</p>	Gender should be a consideration in the appointment of the vice-chairperson.	Amend to provide that the vice chairperson should not be of the same gender as the chair-person.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>Section 4 (2)(d) empowers the <i>Public Health Officers</i> and <i>Technicians Council</i> to consider and approve the qualifications of public health officers and technicians for the purposes of registration.</p>	<p>The function of the national government is to prescribe standards for the registration and licensing of health provides. It is the duty of the counties is to register and licence healthcare providers in accordance with these standards.</p>	<p>Amend to clarify roles of either level of government. The function of the Council shall be only to prescribe the qualifications required by public health officers and technicians. Registration at the county level is a function of the county government.</p>
	<p>Section 4 (2)(k) provides that the council shall prescribe and approve the badges, insignias and uniforms worn by public health officers and technicians.</p>	<p>Under the devolved system of government, the national government has the function of prescribing standards which in this context includes prescribing the standards for the badges, insignias and uniforms to be worn by public health officers and technicians. However, the function of approving badges, insignias and uniforms is now a county function because it is part of implementing national policies and standards.</p>	<p>Amend to provide that the Council shall only prescribe the standards for badges, insignias and uniforms to be worn by public health officers and technicians.</p>
	<p>Section 23 provides that the Chief Public Health Officer shall be the registrar of the council.</p>	<p>The Officer of Chief Public Health Officer does not exist in the current health system as set out by the Heath Act. Also, the registration of healthcare providers is now a county function.</p>	<p>Amend to align with the new structures.</p>
	<p>Section 24 provides for the criteria to be met by persons to enable them be registered as public health officers and technicians. The language in the section implies that the council is responsible for the actual registration of public health officers</p>	<p>The function is situated in a centralised system of governance and does not distinguish registration by the council and that by a county government function.</p>	<p>Amend to clarify that the function of the council visa vis that of county governments in regard to registration.</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	and technicians. For example, Section 24 (5) provides for criteria to be met before the council can authorise the registration of a person as a <i>Public Health Officer or Technician</i> .		
	Section 25 requires all persons wishing to be registered to public health officers and technicians to apply to the council.	The function of the council shall be to set standards for the registration of public health officers and technicians.	Amend to include county government roles.
	Section 26 requires the council to maintain registers for public health officers and technicians. It also provides for the amendment of the registers.	Include the need for registers at the county levels.	Amend to provide for maintenance of registers by county governments.
	Section 29 requires the registrar to remove the names of persons from the register in certain cases for example deceased persons or persons who request to have their names removed from the register.	The management of registers shall now be done at the county level as well	Amend to provide for the updating of registers by the respective county governments as well.
	Section 32 provides that the council shall issue both practising certificates and annual licences to public health officers engaging in private practice.	The County Governments are tasked with implementing standards set by the national government and the issuing of licences for practicing at the county level.	Amend to factor the role of county governments- issuing of licenses in accordance with the criteria specified by the Council.
	Section 33 provides for the procedure of application for a practising certificate from the council registrar.	The procedure is set in a centralised system of government.	Amend to also provide the procedure applicable at the county level.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	Section 35 empowers the Council to receive and grant or deny applications for the renewal of practising certificates.	see comment above	Amend to also provide the procedure applicable at the county level.
	Section 37 establishes the disciplinary Committee of the council.	Article 27 (8) requires the state to put in place legislative measures to ensure that not more the $\frac{2}{3}$ of the members of any elective or appointive body shall be of the same gender. Any clause that prescribed composition of a body must provide for the need to ensure compliance with the $\frac{2}{3}$ gender principle.	Amend to provide that not more the $\frac{2}{3}$ of the members of the committee shall be of the same gender
	Section 43 allows any public health officer or technician whose name has been removed from the register to appeal to the council, upon the expiry of 3 years from the date of its removal, to restore their name to the register.	Since registers will be maintained at the county level their sis need to synchronise with counties.	Amend to provide for a procedure for the notification of county governments on any restoration of names removed from their registers. It may further be prudent to notify all county governments through an intergovernmental process.
	Section 5 provides that fees payable to the council for professional licences.	The licencing of public health officers and technicians in a county is not a function of the council. Thus, licencing fees should be payable to the county government not the council.	Amend to provide that the relevant fees are payable to the county government.
	Section 6 provides that fees payable to the council for registration of firms, consultancies and NGOs to operate in Kenya.	The registration of firms, consultancies and NGOs to operate in Kenya are mandates that may fall with the NGO coordination board and the registrar of companies among others .	Delete or Amend to provide clarity

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
Kenya Medical Training College Act (Cap 261)	Section 3 (1) (b) provides that the Kenya Medical Training College shall include such other institutions as the Minister may, in consultation with the Board of Management of the College, declare to be training centres of the College.	The office of “Minister” has been replaced with that of “Cabinet Secretary”.	Amend to remove the word “Minister” and replace it with the words “Cabinet Secretary”. This amendment should be made throughout the Act.
	Section 8 provides that the Principal of the College shall be appointed by the Minister while the two Deputy Principals shall be appointed by the Board. The section is silent on gender considerations.	As KMTC is a state corporation, it is bound by the two thirds gender rule provided for in Article 27 (8) .	Amend to provide that, in appointing the Principal and deputy Principals of the College, the Minister and the Board of Management shall adhere to the constitutional principles on gender equality.
	Section 9 (1) provides for the composition of the Board of Management of the College.	Articles 10, 27 and 237 , of the Constitution provide for principles of governance. These include inclusion and equality, not more than $\frac{2}{3}$ of either gender and regional balance. These principles should guide the appointment of Board members of KMTC.	Amend to provide that when appointing the members of the Board who are not ex-officio members, the President, the Cabinet Secretary and the Board shall be guided by the principles of the constitution.
	Section 11 (1) provides for the composition of the Academic board which includes two members of the academic staff and two student members.	see comment above	Amend to provide that one of the two members of the academic staff of the college elected to the Academic Board shall be a woman and the other a man. The same shall go for the two student-elected members of the Academic Board. Subject to ensuring competence also provide for regional balance.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
<p>National Authority for the Campaign Against Alcohol and Drug Abuse Act (Act No 14 of 2012)</p>	<p>Section 5 (a) mandates NACADA to carry out public education on alcohol and drug abuse directly or in collaboration with other public or private bodies.</p>	<p>Public education on alcohol and drug abuse is part of health education which is part of primary healthcare. Primary healthcare is a county function thus cannot be legally performed by NACADA which is a national government body.</p> <p>There is need for inter-governmental discussions on the role of NACADA under the devolved governance structure. This may require that</p> <ul style="list-style-type: none"> ▪ NACADA cedes all the county functions that it is currently undertaking or ▪ NACADA is transformed into an intergovernmental parastatal pursuant to an intergovernmental agreement by the national and county governments. 	<p>Amend to reflect the fact that public education on alcohol and drug abuse is also a county health function and whatever intergovernmental agreement that may be reached on NACADA.</p>
	<p>Section 5 (b) empowers NACADA to co-ordinate and facilitate public participation in the control of alcohol and drug abuse.</p>	<p>The control of drugs and health promotion are county functions. The law cannot mandate that they are performed by a national government body.</p>	<p>Remove this section entirely.</p>
	<p>Section 5 (e) empowers NACADA to establish rehabilitation centres and programmes as well as set standards for their operation.</p>	<p>The establishment and operation of rehabilitation centres is a county function. The function of NACADA as a national government body should be limited to advising the Cabinet Secretary on the standards for the establishment and operation of these centres.</p>	<p>Delete or Amend to provide that NACADA shall advise the Cabinet secretary in the development of standards for guiding County governments on the establishment and operation of rehabilitation centres for persons suffering from substance abuse disorders.</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	Section 5 (f) empowers NACADA to license and regulate the operation of rehabilitation centres.	see comment above	Delete.
	Section 5 (g) not only empowers NACADA to formulate national policies, laws and plans of action on the control of alcohol and drug abuse but also implement and enforce these plans.	Implementation and enforcement of national policy is a county function. It should therefore be performed by the county governments and not by NACADA.	Amend to limit NACADA's powers to only advise the cabinet secretary on the formulation of national policies on the control of alcohol and drug abuse.
	Section 5 (k) provides that NACADA shall assist and support the counties in the development and implementation of policies, laws and plans of action.	The national government has no constitutional powers to mandate a national government entity to carry out county functions without the relevant intergovernmental agreement.	Delete
	Section 6 (2) The subsection provides for the criteria to be considered when appointing the non-ex-officio members of the board. They are impeccable character, high moral standards and the capacity to achieve the objectives of the authority.	Delete these sections and revise to situate the provision in devolved governance.	Amend to provide that the representation of women and other marginalised groups and to ensure regional balance in the consideration of the appointment the non-ex-officio members of the Board.
	Section 19 empowers the Cabinet Secretary to appoint authorised persons upon recommendation by NACADA. The Function of these officers, as set out in Section 20 of the Act is the enforcement of the Narcotic Drugs and Psychotropic Drugs Act (Act No.4 of 1994) .	Delete these sections and revise to situate the provision in devolved governance.	Delete these sections and revise to situate the provision in devolved governance.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	Section 20 empowers authorised officers to apply ex parte to a Magistrate's Court or a High Court for a warrant to search a premise.	Delete these sections and revise to situate the provision in devolved governance.	Delete these sections and revise to situate the provision in devolved governance.
	Section 22 empowers authorised officers to seize property during their search of a premises.	Enforcing the Narcotic Drugs and Psychotropic Drugs Act is part of the larger function of controlling drugs which is a county function and a function of the National Police Service.	Delete these sections and revise to situate the provision in devolved governance.
	Section 24 creates the offence of obstructing an authorised officer who is performing their duties under the act.	Enforcing the Narcotic Drugs and Psychotropic Drugs Act is part of the larger function of controlling drugs which is a county function and a function of the National Police Service.	Delete these sections and revise to situate the provision in devolved governance.
The Alcoholic Drinks Control Act (Act No. 4 of 2012)	Section 2 refers to offices that do not exist under the current system of government. For example, the term "Minister" is defined to mean the minister for matters relating to the provincial administration	The office of minister does not exist as a result of Article 152 of the Constitution which creates the office of Cabinet Secretary. Furthermore, the provincial administration was abolished when the devolved system was introduced.	Amend to align to the current system of government.
	Section 3 of the act sets out the objects of the Act. These objects include both national and County government functions such as protection of the consumer rights of alcohol consumer's health education.	The clustering of county government functions with national government functions without clearly differentiating on the responsibilities for each level shall lead to confusion and conflict when it comes to implementation of the Act.	Amend section to differentiate between the objects which are National government functions and those which are county government functions.
	Section 4 (c) empowers NACADA to advise the Minister on the national policy to be adopted with regards to the	The section may be in conflict with devolved governance since the policies being advised are operationalised by counties.	Amend to factor the role of counties and limit the responsibility of the national government

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>production, manufacture, sale and consumption of alcoholic drinks.</p> <p>Section 4 (d) empowers NACADA to advise the Minister on various issues including the permissible levels of constituents of alcoholic drinks and the test methods to be used on alcoholic drinks.</p> <p>Section 4 (e) empowers NACADA to make recommendations to the Minister on the formulation of regulations under the Act as well as participate in the formulation of the regulations.</p> <p>Section 2 defines “the Minister” as the Minister for the time being in charge of provincial administration.</p>	<p>Secondly the Cabinet Secretary being advised should be the Cabinet Secretary in charge of health since the matters relate to health functions.</p>	<p>department in line with devolved governance.</p> <p>Replace the definition of Minister in Section 2 with that of “Cabinet Secretary” and replace Ministry In charge of Provincial Administration with Cabinet Secretary in charge of health.</p>
	<p>Section 4 (e) empowers NACADA to provide support and assistance in the establishment of rehabilitation centres which recognise alcoholism as a disease.</p>	<p>The establishment of county rehabilitation centres is a county government function. The national government is responsible for national rehabilitation centres. Thus, NACADA, which is a national government agency can only provide assistance in the establishment of national rehabilitation centres.</p>	<p>Amend to specify that NACADA shall only assist in the establishment of national rehabilitation centres.</p>
	<p>Section 5 establishes the <i>Alcoholics Drinks Control Fund</i> which shall consist of, among others, licence and another fees payable under the Act. The Fund shall finance:</p> <p>a) research on alcoholic drinks;</p>	<p>The Fund is situated in the previous system of government. For example, the objects of the Fund include both county and national functions. Furthermore, one of the main sources of money for the fund, licensing fees, shall now be collected by</p>	<p>Delete the section. If it is to be retained determine from an agreement between the two levels of government if county government have agreed to seed their function to NACADA.</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<ul style="list-style-type: none"> b) promoting national cessation and rehabilitation programmes; c) the functions of the District Committees; and d) Any other incidental matters to the above. 	the counties.	
	<p>Section 6 provides that the <i>Alcoholic Drinks Control Fund</i> shall be administered by an Accounting Officer of NACADA and such other staff as he/she shall require. The Accounting Officer shall prepare and submit statements of accounts to the Controller and Auditor General.</p>	The Fund is situated in the previous system of government. Refer to the comment above.	Delete this section.
	<p>Section 8 (1) provides for the establishment of District Committees whose function shall be issue licences and perform any other function allocated to them by the Minister.</p>	Issuance of licences is a county function which is to be carried out in accordance with the standards and criteria set by the national government.	Delete this section and provide the issuance of licences by the county governments.
	<p>Section 9 provides for the procedure to be followed when applying for a licence to manufacture alcoholic drinks. Once an application in the prescribed form has been made to the <i>District Committee</i>, the District Committee shall share the same with the Commissioner of Police (or such other police officer appointed by him for that purpose),</p>	The section refers to offices which existed under the previous system of government.	Delete. Let the licence application procedures be defined in the county legislation.

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	the Medical Officer of Health of the District and the local authority.		
	Section 10 empowers the District Committee to grant licences where they are satisfied with an application for a licence to manufacture alcoholic drinks or sell alcoholic drinks. Where the <i>District Committee</i> is not satisfied with an application, they may, while giving their reasons and making recommendations, reject the application.	The function of granting licences is a county government function. When performing this function, counties are to be guided by the standards set by the national government.	Delete. Let the licence application procedures be defined in the county legislation.
	Section 11 empowers the District Committees to grant provisional licences where an application to use a premise for the sale of alcoholic drinks is made in respect of a premises which is about to be constructed or in the course of construction or reconstruction.	The function of granting provisional licences is a county government function.	Delete. Let the licence application procedures be defined in the county legislation.
	Section 12 provides some of the criteria to be considered when District Committees are reviewing applications for licences.	The function of granting provisional licences is a county government function.	Delete. Let the licence application procedures be defined in the county legislation.
	Section 13 provides for the factors which would cause a District Committee to reject an application for a licence or an application for the renewal of a licence.	The function of granting or refusing licences is a county function.	Delete. Let the licence application procedures be defined in the county legislation.
	Section 14 empowers the District Committees to grant applications for the renewal, transfer	The function of renewing, transferring and withdrawing licences is a county function.	Delete. Let the licence application procedures be defined in the county legislation.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

	and withdrawal of the licences.		
	Section 16 empowers a District Committee to require a corporate body which applies for a licence to disclose its directorship. Where any of the directors would not qualify to be granted a licence individually, the District Committee may refuse to grant the licence.	Granting or refusing to grant licences is a county function.	Delete. Let the licence application procedures be defined in the county legislation.
	Section 18 provides for the procedure of transfer of a license when the licensee sells the premises to which the license applies.	The function of renewing, transferring and withdrawing licences is a county function.	Delete. Let the licence application procedures be defined in the county legislation.
	Section 19 sets out the procedure to be followed when a District Committee refuses to renew a licence. Where there is no pending appeal with regards to the refusal, the licensee shall be issued with a licence to all them deplete any existing stocks of alcohol. Where there is a pending appeal, the licensee shall be granted a licence for the duration of the appeal.	The function of granting, renewing or refusing licences is now a county government function.	Delete. Let the licence application procedures be defined in the county legislation.
	Section 21 (2) empowers a District Committee to allow other persons other than a licensee to run a licensed business.	The power to allow persons to run or manage licensed businesses under the Act is now a county government function.	Delete. Let the licence application procedures be defined in the county legislation.
	Section 25 empowers medical officers to visit premises which serve alcohol and ensure they are adhering to sanitation laws. The	The monitoring licensees to ensure compliance with sanitation codes is a county function as it forms part of maintaining standards of environmental health and	Delete and provide for measures which can be adopted by county governments in ensuring premises

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>officer shall then report to the District Committee.</p> <p>It also empowers police officer of the rank of inspector and above to report disorderly premises to the District Committee.</p>	<p>sanitation.</p> <p>Furthermore, District Committees no longer exist in the current system of government.</p>	<p>comply with the provisions of the Act as well as sanitation codes.</p>
	<p>Section 26 empowers a District Committee to cancel a licence upon receipt from a report by a medical officer or a police officer.</p>	<p>The function of cancelling licences is a county government function.</p>	<p>Delete. Let the licence application procedures be defined in the county legislation.</p>
	<p>Section 41 requires any court which convicts a licensee for an offence under the Act to inform the District Committee of the conviction and note the same on the licence.</p>	<p>District Committees do not exist in the current governmental structure.</p>	<p>Amend to require the county government to be informed of the conviction of licensees.</p>
	<p>Section 60 requires the government, through the relevant ministries, and NACADA to promote public awareness about the health consequences, addictive nature and mortal threat posed by excessive alcoholic drink consumption through a comprehensive nationwide education and information campaign.</p>	<p>Health education is a county function.</p>	<p>Delete. Let the licence application procedures be defined in the county legislation.</p>
<p>Human Tissues Act (Cap 252)</p>	<p>Section 2 provides for the conditions which need to be met in order for a person's body, upon their death, to be used for therapeutic purposes or for purposes of medical education or research.</p> <p>It also provides, in Section 3, for the</p>	<p>These issues are covered more comprehensively in the Anatomy Act (Cap 249) which provides for the anatomical examination of dead bodies which includes the use by medical practitioners and teachers and students of anatomy.</p>	<p>Harmonise the Act with the Anatomy Act (Cap 249) Repeal the Act</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	limitations to authority granted to use a person's body for these purposes.		
Counsellors and Psychologists Act (Act No 14 of 2014)	Section 4 (6) requires that, in appointing members of the <i>Counsellors and Psychologist Board</i> , the Cabinet Secretary shall take into account the gender, regional and other diversities of the people of Kenya.	Article 27(8) of the Constitution expressly requires the government to put in place legislative measures to ensure that two-thirds of elective or appointive bodies are of the same gender. Thus, it is not sufficient for the Act to require that, in appointing the members of the board, the Cabinet Secretary should take into account gender diversity.	Amend to provide that the Cabinet Secretary shall ensure that two-thirds of the members of the Board are not of the same gender.
	Section 6 (c) empowers the <i>Counsellor's and Psychologist Board</i> to register and licence counsellors and psychologists.	Licensing of healthcare providers who will practice in Counties is a county government function. It is also expected that counties will also keep their own register of health care providers. The function of the council, as a national government body is to set standards for the execution of this function.	Amend to provide that the Council will provide county governments with guidelines of the criteria to be considered when hiring a Counsellor or psychologist. Make the necessary inter-governmental linkage.
	Section 6 (g) empowers the <i>Counsellors and Psychologists Board</i> to take the necessary disciplinary measures in cases of professional misconduct and indiscipline.	Part VI of the Health Act (Act No, 21 of 2017) establishes the Health Professions Oversight Authority. One of the functions of this authority is to receive and facilitate the resolution of complaints from aggrieved patients. There is overlap between the functions of the <i>Counsellors and Psychologists Board</i> and the <i>Health Professions Oversight Authority</i> .	Amend to harmonise with the Health Act ; clearly distinguish the mandate of the <i>Health Professions Oversight Authority</i> with regards to complaints against counsellors and psychologists and that of the <i>Counsellors and Psychologists Board</i> and with the employers' administrative action in line with article 47.
	Section 6 (j) empowers the <i>Counsellors and Psychologist Board</i> to, upon request, act as an	Part VI of the Health Act (Act No, 21 of 2017) establishes the <i>Health Professions Oversight</i>	Amend to harmonise with the Health Act, specify the particular instances in which the

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	arbitrator in disputes between a counsellor or psychologist and a client.	<i>Authority.</i> One of the functions of this authority is to receive and facilitate the resolution of complaints from aggrieved patients. The existence of two bodies with the same function shall result in confusion and possibly conflict between the bodies.	Counsellors and Psychologists Board shall be called in to arbitrate disputes between counsellors/psychologists and their clients. Also, specify the instances in which the complaints must be taken before the Authority.
	Section 21 provides that the Council of the <i>Counsellors and Psychologists Society</i> shall consist of a chairperson and 10 other members who shall be elected in accordance with the 4 th Schedule.	Article 27 (8) of the Constitution expressly requires the government to put in place legislative measures to ensure that two-thirds of elective or appointive bodies are of the same gender. Articles 10, 232 also requires inclusion of the marginalised and regional balance This election procedure does not meet this requirement.	Amend the Sub-Paragraph 1 of the 4 th Schedule to provide for a procedure of election of the 10 members of the Council which ensures that two-thirds of the council are not of the same gender, that regional balance and inclusion of the marginalised is also required.
	Sub-Paragraph 1 of the 4 th Schedule provides that the 10 members of the Council shall be elected at the annual general meeting of the Society.		
	Section 23 (1)(d) provides that a person shall be eligible for registration under the Act if they satisfy the Board that they are of good moral character and fit and proper to be registered.	Registration of healthcare providers which includes counsellors and psychologists, be shared with the county government. The function of the Board, as a national government body, is to prescribe criteria to guide the county governments on registration of counsellors and psychologists or to determine how the council process related to the County process.	Amend to clarify that the function of the council vis a vis that of county governments in regard to registration. Require that the person meet the requirement in the ethics and leadership Act.
	Section 24 requires a person who wishes to be registered as a counsellor or psychologist to apply to the registrar in the	Registration is likely to be done at the two levels of government.	Amend to clarify that the function of the council vis a vis that of county governments in regard to registration.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

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	prescribed form. Where the person has been accepted by the board, the registrar shall register them and issue them with a certificate.		
	Section 25 requires the registrar to maintain a register of counsellors and psychologists.	The county governments will also maintain a register of their staff.	Amend to recognise that, in addition to registration by professional bodies, the registration of counsellors and psychologists shall also be done by the county governments thus, the keeping of the registers shall also be done at a county level.
	Section 26 provides for the process by which the Registrar may amend the register and the instances in which it shall be allowed.	County governments will from time to time amend their registers function.	Amend to recognise that, in addition to registration by professional bodies, the registration of counsellors and psychologists shall also be done by the county governments thus there shall be need to update county register upon amendment of the register.
	Section 28 provides that one cannot practise as a counsellor or psychologist unless licensed to do so by the Board. Furthermore, the Board may issue a counsellor or psychologist with a licence to practice on their own or be employed as a counsellor or psychologist.	Licensing healthcare providers is a county government function.	Amend to provide that practise licences shall be granted by county governments. However, the county governments shall be guided by the standards set by the council and shall not licence anyone who is not registered with the Council.
	Section 29 (2) and (3) provide for the procedure to be followed where a	Licensing healthcare providers is a county government function.	Amend to provide for a procedure applicable by county governments.

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	person has not renewed their licence for a year wishes to renew their licence.		
	Section 34 provides for the procedure to be followed where a person wishes to lodge a complaint against a counsellor or psychologist. It also provides the possible sanctions which can be levied against a counsellor or psychologist.	Part VI of the Health Act (Act No, 21 of 2017) establishes the <i>Health Professions Oversight Authority</i> . One of the functions of this authority is to receive and facilitate the resolution of complaints from aggrieved patients. Article 47 of the Constitution provides for fair administrative action.	Amend to clearly distinguish the mandate of the <i>Health Professions Oversight Authority</i> with regards to complaints against counsellors and psychologists and that of the Counsellors and Psychologists Board. Also, provide for fair administrative (Article 47) processes within the service delivery points which will also be in county facilities.
	Section 35 provides for the effect of the removal of a name from the register. It also provides for the procedure of getting one's name restored to the register.	county governments also have a role in matters of removal and restoration on the register function.	Amend to provide for the procedure of linking this procedure to the county government operations and registers upon the removal or return of a name of a counsellor or psychologist from the register and on restoration.
	Section 36 provides for appeals from the decisions of the Board after the hearing of a complaint.	Part VI of the Health Act (Act No, 21 of 2017) establishes the <i>Health Professions Oversight Authority</i> . One of the functions of this authority is to receive and facilitate the resolution of complaints from aggrieved patients.	Amend to clearly distinguish the mandate of the <i>Health Professions Oversight Authority</i> with regards to complaints against counsellors and psychologists and that of the Counsellors and Psychologists Board. The procedure should be clear and sequential beginning with the facility administrative action to the Authority.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	Sub-Paragraph 5 of the 4th Schedule creates the position of <i>Vice-Chairperson</i> of the Council. It is silent on the aspect of gender.	In the spirit of gender inclusivity (Article 10 (2)(b) of the Constitution), the chairperson of the council and the vice chairperson should not be of the same gender.	Amend to include that the <i>vice-Chairperson</i> shall not be of the same gender as the chairperson.
Clinical Officers (Training, Registration and Licensing) Act (Cap 260)	Section 2 ascribes the same definition to the term “medical officer of health” as is in the Public Health Act.	The definition of a medical officer under the Public Health Act includes office from the previous centralised system of government for example <i>Director of medical Services</i> .	Amend to provide a definition which is in line with the devolved system of governance and as set out in the Health Act .
	Section 3 (1) provides for the membership of the Clinical Officers Council. They include the Director of Medical Services and 2 medical officer of health appointed by the Minister.	The <i>Officer of Director of Medical Services</i> exists under the precious system of government. Appointment of medical officers of health for county health facilities has now been devolved to the county governments. The national government is only responsible for appointing health officers in national referral health facilities. There is no mention in the section of gender considerations when appointing members of the council.	Amend to constitute the board in accordance line with the devolved system of governance as set out by the Health Act (Act No. 21 of 2017) . Amend to provide that, in appointing members of the Council, the Cabinet Secretary shall ensure that not more than two-thirds of the members are from one gender. Also, provide for regional balance and inclusion of the marginalised.
	Section 3 (4) requires the Council to elect a deputy chairman from among its members.	Gender inclusivity is a constitutional requirement for all elective and appointive bodies.	Amend to provide that the chairperson and the deputy chairperson of the Council shall not be of the same gender.
	Section 5 (e) empowers the Council to take the necessary disciplinary measures in cases of professional misconduct.	Part VI of the Health Act (Act No 21 of 2017) establishes the Health Professions Oversight Authority. One of the functions of this authority is to receive and facilitate the resolution of complaints from aggrieved patients. Article 47 also required fair administrative procedures	Amend to clearly distinguish the mandate of the <i>Health Professions Oversight Authority</i> with regards to complaints against clinical officers and that of the <i>Clinical Officers’ Council</i> . Also, provide for fair administrative processes at facilities

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
		to be entrenched in public service operations.	which will include those set by county governments.
	Section 6 (1) provides that the Chief Clinical Officer shall be the registrar of the Council.	There is no provision for the establishment of the Office of Chief Clinical Officer	Delete or determine and provide for this position and the distinct role expected of this office.
	Section 6 (3) empowers the Registrar to keep a register of the names of clinical officers. Section 6 (4) empowers the registrar to make the necessary alterations to the register.	Registering healthcare providers will also be done by county governments.	Amend to clarify and differentiate between any registration that will be done by counties in respect of its human resources and that to be done by this body noting that registration for purposes of licencing professionals is national government function that is usually delegated to professional bodies.
	Section 7 (1) provides for the registration of persons as clinical officers by the Council.	See comment above	See comment above.
	Section 8 (1) prohibits the rendering of medical services by persons who are not registered by the Council.	County governments are will be the employers of majority of the clinical officers.	Amend to make a linkage between the County as the employer and the council as the body that licences professionals in order to ensure harmony.
	Section 9 requires persons who are deleted from the register to surrender their certificates to the council for cancellation with 30 days of the publication of the deletion.	county governments as employers would need to be notified in order to ensure protection of the public from any illegal services by a deleted (deregistered) person.	Amend to provide for the notification of county governments where a name is removed from the register.
	Section 11 provides for the issuance and renewal of licences for private practices.	Licensing healthcare providers in counties is a county government mandate. The function of the Council should be to	Amend to provide for the issuance of licences to private practices by the county government.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
		provide guidelines to guide the counties.	
	<p>Section 13 (4) provides that private practices must comply with building requirements set out in the third schedule. These requirements include that the building should be made of permanent standard or made of wattle, mud as may be approved by the local medical officer of health.</p>	<p>The function of setting standards for healthcare facilities is a national government function. The local medical officer of health is likely to be a county government officer. The county governments are not tasked with ensuring these standards set at the national level are met and continuously complied with.</p>	<p>Amend this section to properly make the distinction in relation to standards to apply in the establishment of private practises.</p>
<p>Health Records and Information Managers Act (Act No 15 of 2016)</p>	<p>Section 2 defines the terms “Association” as the Association of Medical Records Officers of Kenya.</p>	<p>The Act does not provide for any such association.</p>	<p>Amend the act to provide for the establishment, membership, leadership and functions of the Association of Medical Records Officers of Kenya.</p>
	<p>Section 7 (1) of the Act provides for the composition of the Board. The non-ex-officio members of the Board include:</p> <p>a) Section 7 (1)(d) provides for the appointment by the Board of a manager from private practice;</p> <p>b) Section 7 (1)(g) provides for the appointment, by the Cabinet Secretary, of 2 managers; and</p> <p>Section 7 (1)(h) provides for the co-opting of one more member by the Board whose knowledge and experience is deemed necessary.</p>	<p>There is no requirement that gender or ethical diversity be considered when appointing these members.</p> <p>The Health Laws (Amendment) Bill, 2018 provides for the reconstitution of the board. In the proposed board, there is only a vague requirement that gender or ethical diversity be considered when appointing non-ex-officio members.</p> <p>Also, the amendments proposed by the Health Laws (Amendment) Bill refer to Sub-Section (1)(g) which the bill then deletes.</p>	<p>Amend to provide that 2/3 of the non-ex-officio members shall be of the same gender.</p> <p>Review the composition of the Board as provided by the Health Laws (Amendment) Bill, 2018.</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	Section 9 (1) provides for the election of the Chairperson and Vice-Chairperson of the Board	There is no requirement that gender balance be considered when appointing these members. The Health Laws (Amendment) Bill, 2018 provides for the appointment of the chairperson of the Board by the Cabinet Secretary from among the managers appointed under Sub-Section (1)(g) . It is however silent on how this amendment affects section 9.	Amend to provide that the chairperson and the vice-chairperson shall not be of the same gender. Review the composition of the Board as provided by the Health Laws (Amendment) Bill, 2018 .
	Section 9 (5) empowers the Cabinet Secretary to annul or revoke the appointment, nomination, election or appointment of any member if it is in the national interest.	There is no mechanism put in place to ensure that this power is not abused by the Cabinet Secretary.	Amend to include a mechanism to prevent the abuse of this power.
	Section 16 provides the procedure to be followed in order for a person to be registered as a health records and information manager under the Act.	The registration of healthcare providers is now a county government function.	Amend to provide for the procedure to be followed by the County Government when registering managers.
	Section 17 provides for the maintenance of the register of managers.	The registration of healthcare providers is now a county government function.	Amend to provide for the alignment of county registers with that of the Registrar.
	Section 24 provides for the granting of private practices for health records and information management. Section 24 (1) provides for the licences for private practices for Kenyan nationals and Sections 24 (2)- (5) provides for the licensing of private practices run by foreigners.	Licensing of healthcare providers is a county government function.	Amend to provide for the licensing of private practices by the county government in accordance with the guidelines and standards set by the Board.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>Section 31 empowers the disciplinary committee to suspend managers or cancel their practising certificates or remove the manager's name from the register where they find the manager is guilty of the conduct complained of.</p>	<p>Registration and licensing of managers is now a county government function.</p> <p>The Health Act (Act No.21 of 2017) provides for the <i>Health Professions Oversight Authority</i> whose function includes receiving and facilitating the resolution of complaints from patients, and aggrieved parties.</p>	<p>Amend to provide that the Board must also update the relevant county government about the suspension of a manager.</p> <p>Amend to clarify the role of the <i>Health Professions Oversight Authority</i> and that of the <i>Disciplinary Committee</i> with regards to handling complaints made against managers.</p>
	<p>Section 32 provides for the lifting of the suspension of a manager where the Board is satisfied that the suspension should be lifted. Upon lifting the suspension, the Board is empowered to restore the registration, practising certificate and annual licence of the manager.</p>	<p>Registration and licensing of managers is now a county government function.</p>	<p>Amend to provide that the Board must also update the relevant county government about the lifting of the suspension of a manager.</p>
	<p>Section 33 empowers the board to restore the name of a manager to the register where the manager appeals to the Board after the expiry of 3 years from the date of the manager's suspension.</p>	<p>Registration and licensing of managers is now a county government function.</p>	<p>Amend to provide that the Board must also update the relevant county government about the restoration of the name of a manager to the register.</p>
	<p>Section 2 of the Schedule to the Act requires members of the board to disclose conflicts of interest in any contracts, proposed contracts or any other matter before the Board in a timely fashion. Failure to do so attracts a fine of Kes 100,000 and/or</p>	<p>Given the scale and importance of the functions of the Board, failure to disclose a conflict of interest should attract steeper penalties such as dismissal, a higher fine and a longer imprisonment term.</p>	<p>Review the penalties for failure to disclose conflicts of interest.</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	imprisonment for a term not exceeding 6 months		
Malaria Prevention Act. (Cap 246)	Section 2 defines a health authority as health authority as defined in the Public Health Act .	The definition of a health authority as defined in the Public Health Act no longer applies in the present system of government.	Amend to provide that a health authority for the purposes of the Act is a county government or any such person authorised by the county government to carry out the functions of the Act.
	Section 14 provides that the provision of the Act shall be in addition to the powers contained in the Public Health Act .	The Public Health Act has been rendered mostly defunct by the Health Act (Act No 21 of 2017) .	Amend to provide that the powers and provisions of the act are in addition to the provisions of the Health Act .
Clinical Officers (Training, registration and Licensing) Act (Act No 20 of 2017)	The Health Laws (Amendment) Bill amends Section 2 of by including the following definition: <i>Kenya Clinical Officers Association</i> means the <i>Kenya Clinical Officers Association</i> registered by the Registrar of Societies Kenya.	There is no provision in the Act for a Kenya Clinical Officers Association.	Amend to provide for the establishment, membership, leadership and functions of the Kenya Clinical Officers Association.
	Section 4(1)(b) provides that the <i>Director of Medical Services</i> shall be a member of the Clinical Officers Council.	The <i>Office of Director of Medical Services</i> was replaced with that of <i>Director General for Health</i> by Section 16 of the Health Act (Act No. 21 of 2017)	Amend to provide that the <i>Director General for Health</i> shall be a member of the Council.
	Section 4(1)(c) provides that the Chief Clinical Officer shall be a member of the Clinical Officers Council.	There is no provision in the Act for the <i>Office of Chief Clinical Officer</i> .	Delete.
	The Health Laws (Amendment) Bill amends Section 4 by inserting a Sub-Section (5) which empowers the Council to elect a chairperson and a	The amended section does not specify that the chairperson and the vice-chairperson should not be of the same gender.	Amend to provide that the chairperson and the vice-chairperson should not be of the same gender.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	vice-chairperson from amongst its members.		
	Section 4 (3) requires the Cabinet Secretary to take into account marginalised groups and persons with disabilities when appointing member of the Board.	The body being constituted is the Clinical Officer’s Council not a board.	Delete the word “Board” and replace it with “Council”.
	Section 5 (2)(e) empowers the Clinical Officer Council to register and licence officers.	Registration and licensing of medical healthcare providers is now a county function. The function of the Council with regards to licensing of Clinical officers should be limited to formulating guidelines and standards to guide the county governments in the licensing of officers.	Amend to clarify the role of the council and the role of the county governments when it comes to registration of clinical officers. Delete the part that empowers the Council to licence clinical officers.
	Section 5 (2)(k) empowers the Clinical Officers Council to prescribe badges, insignias and uniforms for clinical officers.	The role of prescribing badges, insignias and uniforms is a county function. The role of the Board in this instance is to prescribe standards for the badges, insignias and uniforms which shall guide the county governments.	Delete.
	Section 15 (3) provides that the Registrar shall be an ex-officio member of the Council with no right to vote.	Section 4 provides for a council which consists of 6 members excluding the Registrar. This means that it is very likely that there shall be a tie in votes of the council.	Amend Section 15 to give the registrar a vote in the case of a tie. Alternatively, amend Section 4 to give another member of the council a casting vote.
	Section 15 (5)-(6) empowers the Registrar to keep a register of all qualified clinical officers and make amendments to the register where necessary.	The function of registering healthcare providers is a county government function.	Amend to provide for co-ordination between the registrar and the county governments.

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	Section 16 (3) provides for the registration of persons as clinical officers by the Council.	The function of registering healthcare providers is a county government function.	Amend to provide for registration of clinical officers by the county governments.
	Section 18 provides for the surrender of certificates by clinical officers whose names have been removed from the register for any reason.	The function of registering healthcare providers is a county government function	Amend to include a duty, on the part of the registrar, to inform the relevant county government, in a timely manner, where a clinical officer's name is removed from the register.
	The Health Laws (Amendment) Bill amends Section 20 by including subsequent sub-sections which empower the Council to: a) Register and licence medical centres and clinics for private practice; and Inspect premises which are to be used for private practice	The function of licensing healthcare centres is a county government function. The role of the council would be to set standards and provide guidelines to help the counties in the performance of their duty.	Amend to provide that both the inspection of premises to be used as private practices and the granting of private practice licences shall be done by the county governments. Also, amend to require the council to formulate guidelines for the inspection and licensing of private practices.
	Section 21 provides that a person who wishes to engage in private practice must apply to registrar in the prescribed form and the council shall grant him a practising certificate.	The licensing of healthcare providers is a county government function. The function of the council is to set national standards which will guide the county governments in the execution of this function.	Amend to provide that applications for practising certificates shall be made to the county governments and such applications shall be granted in accordance with the guidelines and standards set out by the council.
	Section 22 (1) prohibits any person from engaging in the practice of clinical medicine unless they have a registration certificate and a practising licence from the Council. Section 21 provides that officers must have practising certificates.	Registering and licensing is a county government function.	Amend to provide that registration by the county government is a requirement for clinical officers who intend to practice. Review Section 21 and 22 and align the language.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	However, Section 22 provides for practising licences.		
	Section 22 (4) empowers the council to renew, cancel, suspend or withdraw a licence.	Granting, renewing, cancelling or withdrawing licences is a function of county governments. The function of the council is to provide guidelines to guide the counties.	Amend to provide that renewal, cancellation, suspension of withdrawal of licences shall be done by county governments.
	Section 24 establishes a <i>Disciplinary Committee</i> whose functions include receiving and investigating complaints against clinical officers.	The Health Act (Act No.21 of 2017) provides for the <i>Health Professions Oversight Authority</i> whose function includes receiving and facilitating the resolution of complaints from patients, and aggrieved parties.	Amend to clarify the role of the <i>Health Professions Oversight Authority</i> and that of the <i>Disciplinary Committee</i> with regards to complaints made against clinical officers.
	Section 25 empowers the <i>Disciplinary Committee</i> to revoke or suspend the registration and practice certificates of clinical officers upon investigating the complaint against the officer.	The function of registering and licensing healthcare providers is a county government function.	Amend to require the board to inform the relevant county government when they revoke or suspend an officer's licence or registration.
	Section 31 empowers the Cabinet Secretary to make rules for the better implementation of the Act.	Article 94 (6) of the Constitution requires any Act of parliament which empowers any organ to make law to expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.	Amend to provide for the clarification required by Article 94 (6) .
	Section 4 (3) of the First Schedule to the Act requires members of the council to disclose conflicts of interest in	Given the scale and importance of the functions of the Council, failure to disclose a conflict of interest should attract	Review the penalties for failure to disclose conflicts of interest.

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	any contracts, proposed contracts or any other matter before the council in a timely fashion. Failure to do so attracts a fine of KES 100,000 and/or imprisonment for a term not exceeding 6 months.	steeper penalties such as dismissal, a higher fine and a longer imprisonment term.	
National Health Insurance Fund Act Act No 9 of 1998	Section 2 defines the term “Minister” as the minister in charge of health.	Article 152 of the Constitution provides for appointment of Cabinet Secretaries and not Ministers.	Amend replace the word “Minister” with Cabinet Secretary.
	Section 4 provides for the membership to the Board; however, it omits the representation of county representatives perhaps through the <i>Council of Governors</i> .	Section 19 of the Intergovernmental Relations Act 2012 establishes the <i>Council of Governors</i> and mandates it with among other functions to offer a collective voice on policy issues, and collective consultations on matters of interest to County Governments. The fourth schedule to the Constitution provides that Health is a devolved function. Given the vital role that the Council of Governors plays in matters relating to County Governments, and in this particular regard promotion of the right to health, it is imperative that the Council should be included into the membership of the board. This will ensure representation of the counties and also give effect to article 6 of the Constitution which provides for consultation and cooperation between the two levels of governments.	Section 4 should be amended to include the <i>Council of Governors</i> as one of the members of the Board.

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>Section 5 of the Act enumerates the objects and function of the board including receipt of contributions and making payments.</p>	<p>Health is a devolved function and county governments are employers in their own right. Section 59 of the County Government Act recognizes the role of the <i>County Public Service Board</i> in the employment of county staff. The NHIF board was established as a National Government body during the centralized system of governance hence the need for a provision that realigns the NHIF as an institution to align to devolved governance and its board membership to ensure that in managing and administering funds obtained from employees at both National and County Governments the NHIF is answerable to both levels as an intergovernmental structure.</p>	<p>Section 5 should be reviewed in recognition of the functions of both the National and the County Governments in employment of staff and remittance of contributions for health insurance.</p>
	<p>Section 6 (b) empowers the board to receive any gifts, grants, donations or endowments and make disbursements in accordance with the provisions of the Act</p>	<p>Article 201 of the Constitution relates to the principles of public finance which include the prudent use of resources, in this regard employee contributions. The board should be guided by this when receiving monies and making disbursements.</p>	<p>Section 6 (b) of the act should be amended by incorporating the words that will integrate the spirit of Article 201 of the Constitution at the end of the provision.</p>
	<p>Section 10 creates the <i>Office of the Chief Executive Officer</i> but does not specify a tenure.</p>	<p>The tenure of the Chief Executive Officer is essential as it provides the necessary clarity for the CEO and the board members.</p>	<p>Section 10 should be amended to include a provision on the tenure of the Chief Executive Officer.</p>
	<p>Section 15 (2) refers to persons who qualify as contributors to make payment to the Board.</p>	<p>Article 43 of the Constitution provides that every person has the right to the highest attainable standard of health and the state has a responsibility</p>	<p>Section 15 should be amended to reflect the reality of Article 43 where health is reflected as a right of everyone and the</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
		<p>under Article 21 to ensure progressive realization of this rights by all.</p> <p>There is however need for consultations between both levels of government on the modalities of ensuring that the NHIF is progressively moved to being a fund that can facilitate access to health by all. The current control of the Funds contributions and by the National Government is not tenable given that county governments also remit their employees contributions to the fund. It is also important to note that other contributors to the fund include private sector and individual members of the public.</p> <p>Decisions on the investment of contributors' resources should no longer be entirely at the discretion of the national government. It's important to structure the organization to reflect it as an institution that both levels of government have an interest but more important one whose resources belong to contributors from all sectors of society.</p>	<p>governments at the two levels should find ways of facilitating inclusion of the vulnerable. Possibly a provision to include contributions by the respective governments to support vulnerable persons including older members of the society, orphans and vulnerable persons, persons with severe disabilities among others.</p>
	<p>Section 16 (3)(c) mandates the employer to retain possession of the card issued to the employee, except where the employee requires the card to obtain any benefit or making a claim.</p>	<p>The card is the property of the NHIF with temporary possession by the employee/contributor once issued to the later. The employer merely facilitates the employee to obtain the card, which assists in accessing the benefits. This provisions should be deleted as the employer merely requires a copy of the details of the card for</p>	<p>Section 16 should be amended to reflect the current reality on the contributions to the Fund</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
		<p>record purposes. In any case the funds are a contribution of the employee and not the employer.</p> <p>Further the provision operates on the premise that the Fund is only for employees whereas we know that we have self-employed individuals who are not required to submit to any third party their cards for retention purposes.</p>	
	<p>Section 16 (4) provides that sums deducted from the salary or other remuneration shall not be recoverable from the employer and further reiterates that nothing shall affect the responsibility of the employer for the safe custody of that employee's card.</p>	<p>As noted in Section 16(3) above, the card is the property of the NHIF with temporary possession by the employee/ contributor once issued to the later. The employer merely facilitates the employee to obtain the card which assists in accessing the benefits. To subject the rights of employees in regard to their contribution to such unclear provisions does not make sense</p>	<p>Amend Article 16 to ensure that employees rights visa vis their contributions to the Fund and the employers responsibility towards the employee in respect of those funds are not undermined by the provisions in law. Section 16(4) should also be amended to provide clarity on some of the provisions e.g. <i>to either delete or provide clarity on what was meant by the words "stamp to the value of that sum has been affixed to a card issued to that person and duly canceled vis-à-vis the common practice; or to delete the proviso on the retention by the employee of the employee's card.</i></p>
	<p>Section 16 (6) provides that an employer who fails to remit deductions commits an offence and is liable on conviction to a fine not exceeding fifty thousand shillings.</p>	<p>The imposition of a fine may not be adequate enough to deter many employers and to protect the rights of contributors.</p>	<p>The review should be undertaken to ensure that the fine imposed is punitive enough to deter such practices but that employers are held accountable to meeting the costs of the health</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
			care in respect of any affected employees.
	Section 19 (2) imposes a penalty on failure to make payments on the due date.	Sections 19 (2) should be reviewed to ensure that it is not too punitive as to deny persons who have paid late any services.	Sections 19 (2) and (3) on special contributions should be reviewed to ensure that the rights of contributors to access health services is not denied on the basis late payments.
	Section 21 (5) provides for the documents that will constitute conclusive evidence that a contribution for any month in any financial year has been paid by a person.	Section 21 (5)(a) lists the stamp duly affixed to the card as a form of evidence, which provision brings confusion as the common practice is that no stamp is affixed to the card in any month, hence the need to determine the relevance (or lack thereof) of that provision. See also comments on Section 16(4) above,	Section 21 (5) should be reviewed to either provide clarity on the “stamp duly affixed to the card” or delete the provision
	Section 22 (1) provides that the Board shall pay from the Fund, benefits to declared hospitals for expenses incurred at those hospitals by any contributor, his named spouse, child or other named dependent.	<ol style="list-style-type: none"> 1 The concept of declared hospitals should be reviewed against the need to facilitate access to health services to all in all counties and locations. It might be a practice that violates both the constitutional principle of non-discrimination and some of the trade rules. 2 The inclusion of the group of persons who, on approval by the board are unable to pay will promote access to the right to health for vulnerable groups in society. 	<p>Review the provisions on declared hospitals to incorporate facilitation of access and to provide safeguards against discrimination, illegal trade practices and corruption.</p> <p>Section 22 (1) should be amended to include in the list, persons whom the board has determined that they are unable to pay. These include, as enumerated above, orphans and vulnerable persons, persons with severe disability and older persons in society.</p>
	Section 22 (3) provides in part “Without prejudice to the provisions of Sub-Section (1) the benefits payable from the fund shall be limited to	Section 22 (3) should be reviewed to ensure that the list for which the benefits payable from the fund are exhaustive as the list limits the services for which	<p>Review the list to ensure that all the services listed are exhaustive.</p> <p>In the alternative however, sub-Section 3</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>expenses incurred in respect of..."</p>	<p>expenses can be incurred.</p>	<p>could be amended to ensure that the provision does not limit the benefits for which the fund can pay, but allows for the Board, in consultation with the <i>Cabinet Secretary for Health</i> to publish and publicize information on any other services that may over time be added onto the list, in accordance with Article 35 of the Constitution and the Access to Information Act, 2016.</p>
	<p>Section 23 (2) provides for the documents that a contributor or employee shall on request be entitled to.</p>	<p>The section needs to be amended to ensure efficiency and accountability in service delivery while also ensuring realization of the right of access to information as provided by article 35 of the Constitution and the Access to Information Act 2016.</p>	<p>Section 23 (2) should be amended to allow the contributor or employer on request to the receipt (or other form of documentation) of the payments/contributions by the contributor to the fund receipt (other form of documentation) of the benefits paid by the board on behalf of the contributor.</p> <p>The information may be sought by an individual or a group of contributors and may include information regarding then management of the Fund.</p>
	<p>Section 24 provides for the sale by the board of National hospital Insurance Stamps.</p>	<p>Section 24 should be reviewed to determine the relevance of the provision vis-à-vis the current practice.</p>	<p>The act should be reviewed to ensure that any mention of stamps is relevant and attains the intended purpose of the drafters of the law with regards to the stamps e.g. Section 25 (2)(c); 25 (3); Section 26 (a).</p>

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
	<p>Section 30(2) provides for declaration of any hospital, nursing home or maternity home to be a hospital, limits declaration conditions to charges which may be made by the hospital to any contributor.</p>	<p>The section is however silent on the conditions/standards that must be attained by the health facility before it can be declared a hospital for purposes of the Act. Given that public health facilities under r the charge of national and county governments. It's important that the section confines itself to describing the standards applicable rather than declaring facilities to be 'hospitals'. These details are essential as an objective guide.</p>	<p>Amend to include the requirements/standards that the qualifying health facility is required to meet before a declaration is made.</p> <p>Provide for consultations by the national and county governments through the intergovernmental bodies on a selection criteria that will ensure equitable deployment of the Funds to all counties – based on contribution- and equitable access by citizens to the benefit in all regions.</p> <p>Provide that decisions on matters affecting counties shall be based on discussions in the intergovernmental meetings and shall be presented by the relevant board representatives of the county governments.</p>
	<p>Section 31(2) provides for the enactment of regulations that provide for mechanisms for which the decision of the board or by any person thereof can be reviewed.</p>	<p>It limits the same to anybody or person appointed in accordance with the regulation or a reference to the High Court for a decision on any question of law.</p> <p>Article 47 of the Constitution provides for the right of every person to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Where such right or fundamental freedom has been, or is likely to be adversely affected by and administrative action, the person has a right to be</p>	<p>Amend to include review of any administrative action that limits the right of the contributor in line with Article 47 of the Constitution. This procedure must facilitate easy access to justice for contributors who include people who may not have the financial ability to access the high court.</p>

Table 5: A Review of the Relevant National Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiary Legislations and Legal Notices	Issues	Rationale / Concern	Recommendations
		<p>given written reasons for the action and review of the action. The <i>Commission on Administrative Justice Act</i> mandates the Commission (Ombudsman) with the right of review of any administrative action. Section 31(2) should thus also include the Ombudsman as an avenue for the contributor to seek redress on any such decision.</p>	
	<p>Section 35(2)(c) provides a list of expenditures that amount to annual estimates of the board.</p>	<p>Section 35(2) (c) should be amended to reflect contributions by national and county governments for claims and benefits made on behalf of persons unable to pay for themselves i.e. the vulnerable groups (determine who this will be).</p> <p>This will be particularly relevant where the board uses part of its revenue to make payments for such groups of persons.</p>	<p>Amend to include payments of all claims and benefits made on behalf of persons whom the board has determined are unable to pay for themselves. Provide a clause to prohibit arbitrary and discriminatory decisions on amounts payable for certain individuals- if it is contemplated that certain members of the society and their family members can have unlimited access to the benefits of the fund this should be determines in law and the categories of the members should be defined.</p>

This section focuses on the review of county legislation and regulations, which include:

2.4 County Legislation

An important part of legislative and policy changes are the county laws and policies. As stated in the preceding parts, counties are allocated responsibility over county health services. The Constitution requires counties to develop laws and county policies to facilitate the performance of county functions in the health sector. Accordingly, the audit reviewed 10 counties (Nairobi, Nyeri, Makueni, Kisii, Kisumu, Mombasa, Turkana, Vihiga, Lamu and Wajir). The laws covered include: Nyeri County Health Services Act, 2015, Kisii County Alcoholic Drinks Control Act (Act No. 11 of 2015), The Kisii County NHIF Support Act (Act No. 6 of 2015), the Makueni County Cancer Control Act (Act No. 6 of 2016), and the Nairobi County Alcoholic Drinks Control Act (Act No. 3 of 2014). The Kisii County Health Management Services Fund Bill, 2015 was also reviewed.

Most of the 10 counties that were covered during the review do not have health laws. Furthermore, some of the Bills that were drafted some time back never went through the full legislative process; Bills were abandoned soon after they were developed. In other cases, the counties split issues that would have been comprehensively covered in one piece of legislation. There is also a need for counties to carefully develop legislation in a manner that does not lead to rigidity and lack of flexibility during implementation; the solution here is to leave detailed issues for county regulation and administration action as opposed to making such measures a substantive part of the specific provisions of a law. Finally, with the formation of regional blocs comprising adjoining counties, counties should consider passing laws that can promote cross-county cooperation in provision of health services for effectiveness. Specific analysis of the county legislation reviewed is captured below.

**Table 6: A Review of the Relevant County Laws / Subsidiary Legislations and Legal Notices
Tabulated in a Matrix (Cont'd)**

Name of Laws / Subsidiaries Legislation and Legal Notices.	Issue.	Rationale / Concern	Recommendation
<p><i>Nyeri County Health Services Act, 2015</i></p>	<p>Section 3 does not provide for the implementation of provisions of treaties ratified by Kenya relating to health as they are part of Kenyan laws.</p>	<p>Article 2 (6) of the Constitution provides that treaties that have been ratified by Kenya form part of the laws of Kenya.</p>	<p>The Act should, in addition to the Fourth Schedule to the Constitution; Article 46 and Vision 2030 also provide for Article 2 (6) of the Constitution in regards to international and regional treaties.</p>
	<p>Section 5 assigns functions to the Department responsible for county health services.</p>	<p>A review of the Health Act, 2017 highlights that some of the duties of the County Government provided for in Section 20 are either not provided for in the Nyeri County Health Act or would require one to infer from reading the Nyeri Health Act. Some of these functions include:</p> <ul style="list-style-type: none"> (e) designation of county referral hospitals according to criteria agreed upon by the intergovernmental health coordinating mechanism; (l) making due provision and develop criteria to compensate health care facilities for debts arising through failure to secure payment for bills for non-payment of treatment of indigent users; <p>and</p> <ul style="list-style-type: none"> (n) making known to the public at all times the health facilities through which generalized or specialized services are available to them.” <p>Function (n) above relates to proactive disclosure of information as provided by Article 35 of the Constitution and the Access to Information Act and should</p>	<p>The section should be reviewed to ensure it capture or is consistent with Section 20 of the Health Act, 2017.</p>

Name of Laws / Subsidiaries Legislation and Legal Notices.	Issue.	Rationale / Concern	Recommendation
		not be confused with public participation whose provisions are well addressed in both laws.	
	Section 6(3)(e) provides that one of the functions of the <i>County Director of Health</i> is to report periodically to the <i>National Ministry of Health</i> .	The Health Act, 2017 however provides in Section 19 that the among the functions of the <i>County Director of Health</i> is report periodically to the <i>Director-General</i> for health. It is essential to note that although the <i>Director-General</i> is the technical advisor to the national Government, he/she is not the supervisor of the county government department of health.	Section 6 should be amended to provide for provision of reports to the relevant county officers to avoid challenges in implementation of the county law, where reports are not submitted to the designated officer the county. This will ensure respect for the functional assignment between the two levels. Any programmatic reporting to the national government should be done through inter-governmental agreements between the two levels of government to respect the constitution and the Inter-Governmental Relations Act .
	Section 12 provides for operational guidelines and standards for administration of health facilities.		The <i>Executive Secretary (County Executive Committee member-in-charge of health)</i> should prescribe for county operational policies and guidelines for management and administration of a health facility in accordance with existing norms and standards.
	Section 13 provides that the department and each county health facility shall adapt a health service delivery system as guided	An audit of the interpretation clause and Section 13 does not provide the reader of the law with the definition of “health	The act should be amended by providing definition of the term “health service delivery system.”

Table 6: A Review of the Relevant County Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiaries Legislation and Legal Notices.	Issue.	Rationale / Concern	Recommendation
	by the <i>County Health Policy Framework, County Health Strategic</i> and investment plans and annual work plans.	service delivery system.”	
	<p>Section 21 (6) and Section 35 provide that the <i>Executive Secretary</i> shall prepare health related laws and policies stipulated under the Fourth Schedule to the Act which include:</p> <ol style="list-style-type: none"> 1. Environmental health Sanitation and hygiene. 2. Occupational safety. 3. Public health. 4. Tobacco control. 5. Pharmacy and Poisons Act. 6. Treatment and rehabilitation for alcohol and drug dependency. 7. Mental health. 8. Emergency health. 9. Food safety and control. 10. Ambulance services, including referral systems and linkages. 11. Persons with disabilities Act, 2003. 12. Herbal and Alternative Therapist; and 13. Any other laws and policies that the county may find necessary from time to time. 		Delete and prepare Bills for the enactment of these laws.
	Sections 15 - 17 address the rights and duties of healthcare personnel as well as those of a patient.	The section fails to provide for protection of the consumer of the right to health.	The Act should be amended to include provisions on measures to be undertaken for either party in case of breach of duty.

Name of Laws / Subsidiaries Legislation and Legal Notices.	Issue.	Rationale / Concern	Recommendation
			It should also provide for the protection of consumer rights in line with the constitution.
The Kisii County Health Management Services Fund Bill, 2015	Section 2 defines the term “Director for Medical Services” as the County Director of Health appointed by the County Public Service Board.	The Health Act (Act No 21 of 2017) in Section 19 creates the Office of County Director of Health and sets out the functions of the office. There is no need to rename the office.	Amend to align with the offices established in the Health Act (Act No 21 of 2017) . Make this amendment throughout the Act.
	Section 2 defines a health facility as a County Hospital, Sub-County Hospital, Health Centre, Clinic or Dispensary;	The Health Act (Act No 21 of 2017) , in the First Schedule , breaks down the different level of health facilities as follows: <ol style="list-style-type: none">1. Community Health Services2. Dispensary / Clinic3. Health Centre4. Primary Hospital5. Secondary Hospital; and6. Tertiary Hospital	Amend to align with the hierarchy of health facilities as set out in the Health Act (Act No 21 of 2017) .
	Section 6 (2) empowers the Executive Committee member in charge of health to remove a member of the County Health Management Services Committee member for any of the grounds specified in 6 (1) which include gross misconduct and incompetence and neglect of duty. Section 6 (5) provides that the County Health Management Services Committee member shall be given the opportunity to defend himself / herself.	The section does not provide for the procedure of making a complaint against a County Health Management Services Committee member or for the hearing of such a complaint. This may result in the abuse of power by the Executive Committee member in charge of health.	Provide for a complaints procedure, which specifies how complaints shall be received and heard.
	Section 11 provides for the establishment of County Hospital Management Committee, Sub-county	This hierarchy of healthcare facilities is not the same as the hierarchy set out in the Health Act (Act No 21 of 2017)	Amend to align with the provisions of the Health Act (Act No 21 of 2017)

**Table 6: A Review of the Relevant County Laws / Subsidiary Legislations and Legal Notices
Tabulated in a Matrix (Cont'd)**

Name of Laws / Subsidiaries Legislation and Legal Notices.	Issue.	Rationale / Concern	Recommendation
	Hospital Management Committees and the Health Centre and Dispensary Management Committees.	2017).	
	Section 13 provides for the instances in which an office of a member of a County Hospital Management Committee, Sub-county Hospital Management Committees and the Health Centre or Dispensary Management Committees becomes vacant. These include instances of the contravention of Chapter 6 of the Constitution .	Removal from office on the grounds of contravention of the provisions of Chapter 6 of the Constitution requires a hearing process. This has not been provided for in the act.	Amend to include provisions on the process or cross reference to any existing process for removal that may have been established by the county public service board.
	Section 15 (1) provides that user charges shall be reviewed from time to time by the <i>Executive Committee Member-in-charge of health</i> , in consultation with the <i>County Health Management Services Committee</i> and the <i>County Treasurer</i> .	Article 43 of the Constitution provides that every Kenyan have the right to healthcare services. This should be main consideration when reviewing user charges.	Amend to specifically provide that when determining user charges, the <i>Executive Committee Member-in-charge of health</i> , <i>County Health Management Services Committee</i> and the <i>County Treasurer</i> should shall take into consideration the need to facilitate access to health as a right for all including the poor, vulnerable and marginalized.
	The First Schedule sets out the composition of the <i>County Hospital Management Committee</i> , <i>Sub-county Hospital Management Committees</i> and the <i>Health Centre and Dispensary Management Committees</i> .	The composition of these committees does not take into account the hierarchy of health facilities as set out in the Health Act (Act No 21 of 2017) . The composition of the committees also does not take into $\frac{2}{3}$ gender rule when it comes to appointing the non-ex-officio members of the committees.	Amend to align with the Health Act (Act No 21 of 2017) . Amend to provide that in appointing the non-ex-officio members of the committees, the <i>Executive Committee member</i> must ensure that not more than $\frac{2}{3}$ of the members are of the same gender.

Name of Laws / Subsidiaries Legislation and Legal Notices.	Issue.	Rationale / Concern	Recommendation
Kisii County Alcoholic Drinks Control Act (Act No 11 of 2015)	Section 4 (2) provides that one of the members of the <i>County Alcoholic Drinks Control Directorate</i> shall be the <i>Officer Commanding Administration Police</i> in the sub-county.	There is no indication of the sub-county to which the section refers. Alternatively, is possible that the provision was supposed to be with regards to the <i>Administration Police</i> in the county.	Amend to clarify the officer being referred to.
	Section 14 empowers the <i>Sub-County Alcoholic Drinks Regulation Committee</i> to hear applications for the granting of licenses and any objections thereto.	Given the provisions of Section 15 , the membership of the committee may benefit from having a person with legal training. The person would guide the committee on matters of fair hearing.	Consider Amending to include, as a member of the committee, an advocate of a minimum number of years standing (possibly 10 years) to guide the committee on matters of evidence and fair hearing.
	Section 15 empowers <i>Sub-County Alcoholic Drinks Regulation Committee</i> take evidence under oath for questions to be determined by the court.	The section provides for hearings by the <i>Sub-County Alcoholic Drinks Regulation Committee</i> of applications for licences not for court hearings.	Amend this section to align it accordingly.
	Section 19 (6) of the act is improperly drafted.	The meaning of the section is unclear because it does not make sense.	Amend to have a clear provision.
	Section 34 of the act is improperly drafted.	The meaning of the section is unclear because it does not make sense.	Amend to have a clear provision.
	Section 35 (1)-(3) empowers the <i>Sub-County Alcoholic Drinks Regulation Committee</i> , upon receiving a report from a public health officer or police officer who has inspected a licensed premises, to conduct hearings to determine whether a license should be cancelled.	The membership of the committee does not include any advocates or persons with legal training. There is therefore no one to guide the committee on matters of fair hearing.	Amend to include, as a member of the committee, an advocate of at least 10 years standing to guide the committee on matters of evidence and fair hearing.
	Section 43 makes it an offence for a licensee under the act to sell alcohol to an intoxicated person or encourage or	It is difficult to enforce this provision; thus, it is likely that this provision can be used to unnecessarily harass licensees which violates	Delete this section

Table 6: A Review of the Relevant County Laws / Subsidiary Legislations and Legal Notices Tabulated in a Matrix (Cont'd)

Name of Laws / Subsidiaries Legislation and Legal Notices.	Issue.	Rationale / Concern	Recommendation
	excite an intoxicated person to drink alcohol.	their right to fair labour practices under Article 41 of the Constitution .	
	Section 58 establishes the <i>County Alcoholic Drinks Control Enforcement Co-ordinating Committee</i> , which is charged with monitoring and co-ordinating the enforcement of the Act and advising the Governor on the enforcement of the Act.	The act already established <i>Sub-County Alcoholic Drinks Regulation Committees</i> and the <i>County Alcoholic Drinks Control Directorate</i> who are tasked with implementing the Act. There is no need for an additional body to oversee enforcement.	Delete this section.
The Kisii County NHIF Support Act (Act No. 6 of 2015)	Section 7 of the Act provides that a <i>Ward Social Protection Committee</i> shall consist of 7 members. However, Section 8 of the Act provides for 9 members.	There is inconsistency with these provisions.	Amend to provide consistency.
	Section 8 provides that all members of the <i>Ward Social Protection Committee</i> except the <i>Chairperson</i> and <i>Secretary</i> of the committee shall serve for periods of 3 years and shall be eligible for one further term of 3 years.	The section does not provide for the terms of the chairperson and <i>Secretary</i> of the Committee.	Amend to specify the terms of the <i>Chairperson</i> and <i>Secretary</i> of the committees.
Makueni County Cancer Control Act (Act No 6 of 2016)	Section 21 of the Act directs medical institutions to notify the <i>Makueni County Cancer Management Institute</i> , within 14 days of making a diagnosis of any type of cancer, of the particulars of the diagnosis including the name of the patient. The patient or their guardian must consent to the disclosure.	The Section does not specify how such consent should be obtained. In light of the provisions of the Article 31 of the Constitution with regards to the right to privacy, the section should specify that every patient (and their guardian) should be clearly informed of the hospital's duty to disclose the diagnosis and the effects of their consenting to the inclusion of their name. Also, consent should be obtained in writing.	Amend protect patients' right to information and right to privacy.

Name of Laws / Subsidiaries Legislation and Legal Notices.	Issue.	Rationale / Concern	Recommendation
	Section 14 (2) of the Act provides that all documents not required to be made under seal and all decisions of the board shall be authenticated by the signatures of the <i>Chairperson</i> and the <i>CEO</i> of the Institution. However, Paragraph 6 (1) of the First Schedule states that contracts can be entered into on behalf of the board by any person generally or specially authorized by the Board for that purpose.	These provisions are inconsistent with each other.	Amend to make the provisions consistent.
Nairobi County Alcoholic Drinks Control Act (Act No 3 of 2014)	Section 4 provides for the composition of the <i>Nairobi City County Alcoholic Drinks Control and Licensing Board</i>	The section does not provide that two thirds of the non-ex-officio members of the Board should not be of the same gender.	Amend to include $\frac{2}{3}$ gender rule requirement for the non-ex-officio members of the Board.
	Section 5 (b) empowers the <i>Nairobi City County Alcoholic Drinks Control and Licensing Board</i> to hear appeals from decisions of the <i>Sub-County Committees</i> .	None of the Board members are required to be advocates. There is therefore no one to guide the board on issues of fair trial and evidence.	Amend to include, as a member of the Board when it is entertaining appeals from committee decisions, an advocate of at least 10 years standing.
	Section 8 empowers <i>Sub-County Alcoholic Drinks Control and Licensing Committees</i> to conduct hearings to determine whether to grant applications for licenses as well as objections to applications for licences.	None of the committee members are required to be advocates. There is therefore no one to guide the board on issues of fair trial and evidence.	Amend to include, as a member of the Committee when it is conducting hearings, an advocate of at least 10 years standing.
	Section 14 provides that a person shall appeal against the decision of a <i>Sub-County Alcoholic Drinks Control and Licensing Committee</i> in accordance with national legislation.	The Alcoholic Drinks Control Act (Act No. 4 of 2010) provides that appeals in respect of denied licences shall lie with the high court. However, Section 5 (b) empowers the <i>Nairobi City County Alcoholic Drinks Control and Licensing Board</i>	Amend to provide for one mechanism for appeals. It would be more efficient to require persons to appeal to the <i>Nairobi City County Alcoholic Drinks Control and Licensing Board</i> .

**Table 6: A Review of the Relevant County Laws / Subsidiary Legislations and Legal Notices
Tabulated in a Matrix (Cont'd)**

Name of Laws / Subsidiaries Legislation and Legal Notices.	Issue.	Rationale / Concern	Recommendation
		to hear appeals from decisions of <i>Sub-County Committees</i> .	
	Section 31 empowers a <i>Sub-county Alcoholic Drinks Control and Licensing Committee</i> , upon receiving a report from a medical officer or police officer with regards to a licensee or licensed premises, to conduct a hearing to determine whether to cancel a licence	None of the committee members are required to be advocates. There is therefore no one to guide the board on issues of fair trial and evidence.	Amend to include, as a member of the Committee when it is conducting hearings, an advocate of at least 10 years standing.

3

PUBLIC FINANCE MANAGEMENT

3.1 Introduction

The Constitution of Kenya 2010 introduced far-reaching reforms to Kenya's system of managing public finances. The reforms entailed not only the decentralisation of the management of public finances to the county level but also the substantial shifting of roles within national level institutions. More importantly, there was a holistic policy shift in terms of objectives and goals of public finance management.

In the period before 2010, management and control of finances and decisions of public finance management was centralised and exercised exclusively by the Ministry of Finance. The former 175 local authorities played a dismal role in control and expenditure of public finances. The overall contribution of the former local authorities to overall economic growth was dismal, to say the least. In the first decade of independence, the local authority expenditure accounted for a general average of 25 percent of the overall government expenditure.¹¹ However, this figure fell sharply in the subsequent years. Between 1975 and 1990, local authority expenditure accounted for a meagre 8-10 percent of the overall government expenditure.¹² Local government share of the GDP fell from 3.26 percent in 1969/70 to 1.22 percent in 1999/2000.¹³

The main reason that local authorities declined is that the national government, over the years, ignored their existence and chose to deliver local development through deconcentrated state institutions and central government programmes. As a result, functions performed by the local authorities, such as: education, health, social development and other essential services were taken over by central government agencies.¹⁴ This action denied local governments vital revenues, which were never replaced. Other revenue sources for local governments were abolished leaving them with little and totally undependable local sources of revenue.¹⁵ Between 1969 and 1989, the local authorities operated without a system of central government transfers and the central government only intervened in case of a crisis.

However a number of fundamental changes were made to address the historical problems that faced the system of management of public finances. First, there are principles of public finance management that guide the planning and application of all public finances. There should be openness and accountability in the handling of all aspects of public finance management. The

11 Republic of Kenya (1995) 71.

12 Republic of Kenya (1995) 71.

13 Rocaboy Y et al 'Public finances of local government in Kenya' in Dafflon B & Madies T (eds) (2012) The Political Economy of Decentralization Sub-Saharan Africa: A New Implementation Model in Burkina Faso, Ghana, Kenya, and Senegal 165.

14 Vide the Local Government Transfer of Functions Act of 1969.

15 In 1989, the Local Government Service Charge (LASC), a surcharge on some specified incomes, was introduced to "boost the revenue base of local authorities so as to enhance service delivery" see Republic of Kenya (1995) 87.

public finance system should also promote an equitable society through: a fair taxation, equitable sharing of national resources, equitable development including inter-generational equity, prudence in the use of public resources, and responsible financial management and reporting.¹⁶

County governments have a guaranteed minimum of resources (15 percent) that should be allocated from revenue collected nationally. New institutions were created with roles carved out of the former all-powerful treasury in order to enhance the practical application of some of the principles above. Parliament was vested with budget-making powers, a function that belonged to the treasury. The Commission on Revenue Allocation was established to advise on allocation of funds between the two levels of government, and the Office of the Controller of Budget (CoB) was established to oversee and authorise public expenditure. All these institutions were established under the Constitution and the pre-2010 National Treasury performed these roles.

More importantly, county governments exercise financial control over funds allocated to them. The Public Finance Management Act was enacted to give effect to the finance management architecture in the Constitution. Specifically, the PFMA was crafted with the intention of modernizing financial management in the public sector, reducing fraud, corruption and waste whilst also providing a legislative framework of fiscal decentralization as contemplated by the Constitution of Kenya. It is equally expected that the PFMA would lead to a more efficient and effective use of public resources while also enhancing the capacity of government to deliver on their services including the realization of the three budget outcomes to wit; – aggregate fiscal discipline, allocative efficiency and operational efficiency.

The role of the public financial-management system is to facilitate the planning and budgeting process of the public sector, the recording of financial information, and the controlling of budget execution. It concerns both the revenue and the expenditure side of the budget. The broad objective of a public financial-management system is to achieve overall financial discipline, allocation of resources to priority areas, and efficient and effective use of public resources for the achievement of results.

3.2 National Legislation

The audit entailed the review of a number of laws related to the management of public finance management. First is the Public Finance Management Act (PFMA), which contains extensive provisions on the management of public finance at both the national and county levels, and relations between the two levels on matters of public finance. The audit has, thus, touched on the Act and proposed amendments to the Act. The audit also reviewed the Public Audit Act and the Public Procurement and Disposal Act. The audit also reviewed the Public Finance Management Regulations.

¹⁶ Article 201, Constitution of Kenya 2010.

Table 7 - Matrix audit of the Public Finance Management Act, 2012

Section of the Act	Requirements	Comments
4(2)	The Cabinet Secretary required by way of Regulations to come up with a Criteria for the Declaration of a State Corporation, an authority or any other body, as a national government entity.	The regulations have fallen short of coming up with an objective criterion for the basis of such declaration. The regulations have simply come up with schedules under which entities deemed as national government are listed. Regulation 3 makes it clear in this regard by affirming the extent and reach of the Regulations from the perspective of the National Government.
Section 12 (1)	The National Treasury is meant to prescribe regulations that ensure that operations of the prescribed financial system under this section respect and promote the distinctiveness of the national and county levels of government;	There is also no evidence in the regulations to show how the National Treasury shall “ensure that operations of a system... respect and promote the distinctiveness of the national and county levels of government” Recommendation: The regulations should be revised to provide appropriate and relevant detail of how the National Treasury shall prescribe an efficient financial management system for the national and county governments that <ol style="list-style-type: none"> 1. ensures transparent financial management; 2. standard financial reporting respects and 3. promotes the distinctiveness of the national and county levels of government.
Section 21(1)	Advances and criteria for such advances from the Contingencies Fund.	No regulations have been developed prescribing the criteria for making advance from the Contingency fund. Section 21(2), (3) and (4) of the PFM Act provide some good criteria which at a minimum could have been expanded on in the regulations.
Section 25(6)	Regulations made under this Act shall <u>prescribe</u> circumstances and the manner in which persons or groups may make written or oral representations about the contents of the statement.	The National Treasury should provide an outline of these mechanisms and manner sourced from its own internal budgeting handbook modified to accommodate this Section of the Act and in consultation with County Treasuries, donor organizations and Civil society to derive a workable formula of minimums necessary to effectively comply. These regulations are couched in mandatory terms.
Section 27(2)	Other than the already detailed requirements of the law with respect to the Pre- Election and Post-Elections Economic and Fiscal update, regulations can further specify any other expenses related to the election.	No regulation addresses this requirement though it may be incumbent on The National Treasury in consultation with the Independent Electoral and Boundaries Commission to formulate a list of what these ‘other expenses’ are and incorporate them in regulation.

Table 7 - Matrix audit of the Public Finance Management Act, 2012 (Cont'd)

Section of the Act	Requirements	Comments
<u>Section 29(5)</u>	The National Treasury may invest, subject to any <u>regulations</u> that may be prescribed, any money kept in a bank account of the national government.	No Regulations address this requirement. Recommendation – Possible way to address this is in the provisions for cash management under Regulation 81 in which there is established a Cash Management Advisory Committee which shall determine “The amount of cash that shall periodically constitute an idle balance or surplus cash in the Treasury Single Account arrangements... on the advice of the Accountant General or the County equivalent”.
<u>Section 31(3)</u>	At the end of every four months, the Cabinet Secretary shall submit a report to Parliament stating the loan balances brought forward, carried down, drawings and amortizations on new loans obtained from outside Kenya or denominated in foreign currency, and such other information <u>as may be prescribed by regulations</u>	The section of the Act already provides a good base to expand on in the regulations, which they do not. Suggested Solution ‘Such other information’ shall include: <ul style="list-style-type: none"> ▪ The total interest expense paid over the period; ▪ The projected interest expense for the following four months; ▪ The project or program for which new loans have been secured; ▪ A summary of total debt exposure vis-à-vis the national debt ceiling.
36(5)	The Cabinet Secretary Shall by regulations prescribes procedures specifying how, when and where members of the public shall participate in the budget process at the national level.	Regulation 32 - Part IV – the regulations need to spell out in detail how public participation shall be conducted. In line with this requirement of the law, the regulations fall short in describing a detailed procedure for public participation in the budget process.
48(3)	“A public officer or <u>third party</u> authorized to receive control or pay public money and grants shall only act within the authority of the Constitution, an Act of Parliament or County legislation as provided in section 196 of the Act.”	Regulations seem not to have provided for this requirement of the law.
<u>50 (4)</u>	The guarantee of debt shall be done in terms of a criteria agreed with the Intergovernmental Budget and Economic Council and prescribed in regulations approved by Parliament.	Regulations do not specify the criteria for guaranteeing of debt.
<u>50 (6)</u>	A public debt incurred by the national government is a charge on the Consolidated Fund, unless the Cabinet Secretary determines, by <u>regulations</u> approved by Parliament, that all or part of the public debt is a charge on another public fund established by the national government or any of its entities.	No regulations address this requirement This appears to be a discretionary feature of debt management subject to the peculiar circumstances of each occurrence; regulations are therefore to be created as the circumstances and conditions demand.

Section of the Act	Requirements	Comments
<u>50 (7)</u>	The Cabinet Secretary shall ensure that the proceeds of any loan raised under this Act are paid into the Consolidated Fund or into any other public fund established by the national government or any of its entities as Cabinet Secretary may determine in <u>accordance with regulations</u> approved by Parliament.	<u>No Regulation addresses this requirement</u>
<u>50 (10)</u>	Expenses incurred in connection with borrowing by the national government is a charge on a such other public fund as the cabinet secretary may determine by regulations	The Regulations do not adequately respond to this requirement; Recommendation: It would be preferable if the regulation spelt out at least what categories of expenses would qualify in the first instance not to be charged to the Consolidate fund.
	53. (11) Subject to any other legislation, secondary trading of national government securities <u>shall be carried out only in such manner as may be prescribed by regulations</u> made for that purpose and for purposes of this subsection “secondary trading” means any activity leading to a change in the ownership of a national government security before its redemption date.	No regulations address this requirement of the law
<u>53 (14)</u>	If, after six years from the redemption date of a national government security, the proceeds of the security have not been collected by, or paid to, the holder or the holder’s personal representatives, the Cabinet Secretary shall return the uncollected amount to the National Exchequer Account to form part of the Consolidated Fund in accordance with regulations.	No Regulation addresses this requirement of the law
<u>56 (1)</u>	The national government may enter into derivative transactions, either directly or indirectly through an intermediary, <u>but only within the framework and limits of the Budget Policy Statement and in a manner prescribed by regulations.</u>	<u>No regulation addresses this requirement of the law</u>
<u>56 (3)</u>	The Cabinet Secretary may enter into a derivative transaction on such terms and <u>conditions, within the scope prescribed by the regulations</u> approved by the National Assembly.	<u>No Regulation responds to this requirement of the law</u>
<u>125 (1) (b)</u>	Planning and establishing financial and economic priorities for the county over the medium term;	<u>This section should be amended to require county governments to prepare Medium Term Expenditure Framework (MTEF) Sector Reports as basis of establishing financial and economic priorities over the medium term</u>

Table 7 - Matrix audit of the Public Finance Management Act, 2012 (Cont'd)

Section of the Act	Requirements	Comments
<u>126 (2)</u>	Every county government shall prepare a development plan in accordance with Article 220(2) of the Constitution, that includes— (g) a summary budget in the format required by <u>regulations</u> ; and (h) such other matters as may be required by the Constitution or this Act.	<u>The regulations do not prescribe the format in accordance with this section of the Act</u>
<u>128 (3) (h)</u>	New subsection	There is need to introduce a new subsection (h) that will require the county executive committee member for finance to include in the circular mechanisms of consultation with the intergovernmental sector working groups on budgeting requirements that border on Article 187 of the Constitution
<u>129 (4)</u>	Replace “shall” with “may” to allow for exercise of discretion	
<u>139 (3)</u>	A third party shall not receive, have custody of, or pay public money otherwise than in accordance with an authorization given in accordance with <u>regulations</u> made under subsection (1).	<u>The regulations do not adequately respond to this requirement of the law</u>
<u>141(8)</u>	Any expenses incurred in connection with borrowing by a county government shall be a charge— (b) on such other county public fund established by the county government or any of its entities as the County Executive Committee member for finance may determine in accordance with <u>regulations</u> approved by the county assembly.	<u>The regulations do not address this requirement of the law</u>
<u>144 (13)</u>	Subject to this Act or any other legislation, secondary trading of county government securities may be carried out only in such manner as may be prescribed by <u>regulations</u> made for the purposes of this subsection and in accordance with the provisions of this Act.	<u>Regulations do not address this requirement of the law</u>
<u>144 (17)</u>	If, after six years from the redemption date of a county government security, the proceeds of the security have not been collected by, or paid to, the holder or the holder’s personal representatives, the County Executive Committee member for finance shall return the uncollected amount to the County Exchequer Account to form part of the County Revenue Fund in accordance with <u>regulations</u> .	<u>Regulations do not address this requirement of the law</u>
<u>146 (2)</u>	The Intergovernmental Budget and Economic Council may agree on <u>regulations</u> with guidelines for county government joint infrastructure investments. Responsibilities of an accounting officer of a county assembly in management of public finances.	<u>Regulations 126 does not fully address this requirement of the law</u>

Section of the Act	Requirements	Comments
207	<p><u>Regulations</u> may provide for participatory governance for purposes of this Act.</p> <p>(2) <u>Regulations</u> made under this section may provide for the following matters- (a) structures for participation; (b) mechanisms, processes and procedures for participation; (c) receipt, processing and consideration of petitions, and complaints lodged by members of the community; (d) notification and public comment procedures; (e) public meetings and hearings; (f) special needs of people who cannot read or write, people with disabilities, women and other disadvantaged groups; (g) matters with regard to which community participation is encouraged; (h) the rights and duties of members of community; and (i) any other matter that enhances community participation.</p>	<p><u>Regulation 7 (National Government) and Regulation 7 (County Governments) are inadequate.</u></p> <p><u>It would be ideal if the regulations spelt out in detail how the requirements of public participation are to be conducted in accordance with the requirements of the Act.</u></p>

Table 8: Matrix Audit of the Public Finance Management (Amendment) Bill 2017

Clause of the Amendment Bill	Requirements	Comments & Recommendations
<p>Clause (2) (Amending section 2 of the PFMA)</p>	<p>Insertion of the Word State Organ into the definition of national government entity.</p>	<p>State Organs are already defined under article 260 of the 2010 Constitution as – “State organ” means a commission, office, agency or other body established under this Constitution. It is therefore very unlikely that the Cabinet Secretary shall have the powers to declare state organs as national government entities for they are already established under the Constitution with set functions and responsibilities. Recommendation: Delete any reference to state organs as proposed under this section.</p>
<p>Clause 5(ii)(k) (Amending Section 10 of the PFMA)</p>	<p>There is a proposal to use the County Fiscal Strategy Paper and Controller of Budget Reports as aids in the Revenue Allocation process.</p>	<p>It is necessary to be clear that the criteria for revenue sharing and the considerations thereto have already been prescribed both under the Constitution and the Law. Further, the County Fiscal Strategy Paper (CFSP) together with the reports of the Controller of Budget are not legally defined as documents that inform decisions on Division of Revenue as under the Constitution. Besides, division and allocation of revenue should be made before preparation of CFSP. Recommendation: Review the clause or delete it altogether.</p>
<p>Clause 8 (a) Amending Section 17 (7) of the PFMA</p>	<p>Revenue Disbursement Schedule</p>	<p>There is need to find ways to ensure that the National Treasury abides by the approved revenue disbursement schedule as provided for under this section of the law. This is due to the fact that counties are heavily reliant or dependent on fiscal transfers from the National Exchequer; for some over 95% of budget is financed by transfers and any delays in the disbursement, as has been witnessed and consistently reported on by the Controller of Budget, considerably undermine service delivery within the counties. Recommendation:</p> <ol style="list-style-type: none"> 1. In the event that there is delay in the passage of the County Allocation of Revenue Act (CARA) which may affect and the Disbursement Schedule, then, Counties should be enabled, by law, to access upto 50 per cent of the indicative allocation of revenue in the approved the Budget Policy Statement. (This would require legal affirmation that once BPS is approved, the indicative amount there-in should be the minimum the counties can be get).

Clause of the Amendment Bill	Requirements	Comments & Recommendations
		<p>2. The National Treasury be legally compelled to ensure that delays in disbursements, due to the counties, do not become the norm as is currently being experienced.</p>
<p>Clause 8 (b) (Amending Section 17 of the PFMA)</p>	<p>No procurement to be carried 3 months to the General Elections.</p>	<p>Though the proposed amendment may be valid and well-intended, it is necessary to provide for exceptions that may allow for emergency procurement by national or county governments, in case emergencies, notwithstanding the fact that such procurement falls within the 3 months' window period.</p>
<p>Clause 10 (b) (Amending Section 35 (1)(j) of the PFMA.</p>	<p>Extending the Reporting time by the National Treasury from 3 months to 4 months.</p>	<p>Article 228 (6) of the Constitution provides as follows: "Every four months, the Controller shall submit to each House of Parliament a report on the implementation of the budgets of the national and county governments". Therefore, extending the duration of time within which the reports of the national government on budgeted revenues and expenditure are submitted, from 3 months to 4 months, shall conflict with the Constitutional role of the Controller of Budget. The office of the Controller of Budget shall not have enough time to consolidate and reports on the budget implementation by the national government, if they are both to report within 4 months. Recommendation: The section should remain as currently provided for in law. The amendment as proposed shall affect reporting by the Controller of Budget, impractical.</p>
<p>Clause 32 (b) Amending Section 112 of the PFMA.</p>	<p>Definition – threats to human life.</p>	<p>It shall be ideal to have these events as described under this clause to form part of the exceptions that may inform the engagement in procurement within the 3 months' window frame to the elections. Refer to clause 8 of the Amendment bill.</p>
<p>Clause 34 (a) Amending Section 117 of the PFMA</p>	<p>Revision of the Timeframe for the submission of County Fiscal Strategy Paper</p>	<p>Legally, preparation of County Fiscal Strategy Paper (CFSP) is guided by the approved Budget Policy Statement (section 117). For this reason, there is need for sufficient time to enable counties consider and be effectively be guided by the contents of approved Budget Policy Statement. Unfortunately, the proposed amendment may have the effect of curtailing the counties will not have time internalize the BPS due to insufficiency of time, especially when both documents are submitted only one day apart.</p>

Table 8: Matrix Audit of the Public Finance Management (Amendment) Bill 2017 (Cont'd)

Clause of the Amendment Bill	Requirements	Comments & Recommendations
		<p>It would be much more effective if the date for the submission of the Budget Policy Statement was pushed ahead to give counties more time to craft their fiscal intentions for the forthcoming financial year and align them to BPS, without being constrained for time.</p> <p>Recommendation:</p> <p>If possible, the date of submission of the Budget Policy statement be moved to January 30th and the same passed not later than 14th February.</p>
<p>Clause 36 Amending section 119 of the PFMA.</p>	<p>Banking arrangements.</p>	<p>Recommendation:</p> <p>The law should allow the counties to open prescribed revenue collection bank accounts, for purposes of dealing with cash collections deposits especially for counties that have remote outposts, where market fees are collected, which would require long journeys to deposit money in Central Bank Branch in the county.</p> <p>The fact of the matter is that the Central Bank of Kenya is not present in all county commercial areas and therefore requiring that counties bank with it without creating room for exceptions may actually become impracticable.</p>
<p>Clause 39 Amending section 127(1) of the PFMA.</p>	<p>Changing the date for the submission of Cash-flow Projections from 15th June to 30th April.</p>	<p>Ideally, cash-flow projections should be based on approved budgets, so that they are accurate to guide fund releases and ensure efficient implementation of the Budget. It is therefore unrealistic to demand for cash-flow projections to be prepared on the basis of budgetary estimates.</p> <p>Recommendation:</p> <p>The intended amendment will create operational problems and ought to be revised to make it more realistic and capable of adequate implementation.</p>
<p>Clause 42 (b) Amending section 131 of the PFMA.</p>	<p>Reductions or increases in a vote.</p>	<p>The intended amendment conflicts with section 131(3) of the PFMA which provides that;</p> <p>“An amendment to the budget estimates may be made by the county assembly only if it is in accordance with the resolutions adopted regarding the County Fiscal Strategy Paper and if— any increase in expenditure in a proposed appropriation, is balanced by a reduction in expenditure in another proposed appropriation”</p> <p>Therefore, the above section already allows the counties to vary their budgets as per the County Fiscal Strategy Paper whilst ensuring that any increase or decrease is matched by a corresponding increase or decrease.</p> <p>The proposed amendment may not therefore be entirely useful if this section still reads as it reads.</p> <p>Recommendation:</p> <p>The intended amendment ought to be revised or done away with altogether.</p>

Clause of the Amendment Bill	Requirements	Comments & Recommendations
		<p>NOTE: It is interesting that there is not a corresponding requirement for the National Government Budgetary Process in making changes after approval of Budget Policy Statement.</p>
<p>Clause 45 Amending section 136 of the PFMA.</p>	<p>Surrender of unspent balances at the end of the Financial Year.</p>	<p>As currently constructed, this intended amendment is unnecessary and may only serve to confuse rather than streamline the process of surrendering unspent monies at the end of the financial year.</p> <ol style="list-style-type: none"> 1. Why should the audit report be a critical factor in the surrender of unspent monies at the end of a financial year? 2. Secondly, section 136(2) already requires that all unspent monies be repaid into the exchequer account and a refund statement prepared and forwarded to the Controller of Budget. 3. Waiting for audit reports shall definitely provide a reason to hold funds longer which ordinarily should be refunded back to the exchequer. <p>Thus, the section does not, in any way, enhance value to the process of surrendering of unspent balances but shall potentially undermine the same.</p> <p>Recommendation: The section should be done away with.</p> <p>NOTE: For consistency purposes, there is not a corresponding requirement for the national government.</p>
<p>Clause 56 Amending Section 171 of the PFMA</p>	<p>Substitution of the word State Organ.</p>	<p>State Organs as Constitutional bodies are already defined in the Constitution and it may therefore be inconsequential to rope them into this section as intended.</p> <p>Additionally, state organs do not operate within the country's space as defined therein.</p> <p>Recommendation: The reference to state organs should be dropped and a much more apt definition sought for.</p>
<p>Clause 66 Amending section 193 of the PFMA</p>	<p>Accountability by the Public-Sector Accounting Standards Board.</p>	<p>The intended amendment is not clear on the requirement of accountability on the part of the Public-Sector Accounting Standards Board.</p> <p>Does the section require functional accountability or reporting accountability by the board to the Cabinet Secretary?</p> <p>Recommendation: The intended amendment to be reviewed for purposes of enhanced clarity.</p>

Table 9 : Matrix Audit of the Public Finance Management Regulations

Reference	Observation and recommendation
Regulations 18 (both National and County Government)	<p>They establish a Committee known as Public Finance Management Standing Committee</p> <p>Comment:</p> <p>Clearly this appears to be the creation of institutions/structures not contemplated by the Act.</p> <p>Recommendation:</p> <p>In our view, any creation of institutions such as this should be stated in the Act and not regulations. While its value is evident, as recommended previously, the preferable avenue for this should be by amending the PFM Act.</p>
Regulation 41	<p>States, “The national government budget estimates and each county government’s budget estimates shall be prepared, accounted for and reported in accordance with the Government of Kenya budget classification and chart of accounts issued by the National Treasury.”</p> <p>Comment:</p> <p>As noted previously in this review, the appearance of a legislative body prescribing rules to a statutory one is problematic. In this instance while eminently understandable and desirable, the basis of budget estimates should be on the basis of the PFM Act and the constitution rather than GoK budget classifications and Chart of Accounts. In other words - statutory basis must be established. In this instance that authority for establishing the format and structure of budget estimates is the Accounting Standards Board – not the National Treasury. See Section 105. (1) of the PFM Act which states that “A County Treasury has such powers as are necessary to enable it to carry out its functions and responsibilities under this Act including- (e) requiring county government entities to comply with all applicable norms or standards regarding accounting practices, budget classification systems and other public financial management systems;” <u>as prescribed by the Accounting Standards Board</u>. The Act also provides further direction about the Chart of Accounts in its preliminaries section (page 30) when it states that: “chart of account” means a structured list of accounts used to classify and record budget revenue and expenditure transactions as well as government assets and liabilities on a <u>standard budget classifications system</u>;</p> <p>Recommendation:</p> <p>Thus, on both accounts of budget classification systems and a chart of accounts, the issuing authority is the Accounting Standards Board. This regulation should therefore be rephrased to read as:</p> <p>“The national government budget estimates and each county government’s budget estimates shall be prepared, accounted for and reported in accordance with the standards laid out by the Accounting Standards Board.”</p>
Regulation 79 (County Government Regulations)	<p>Comment: Regulation 79 (3) States that “Any legislation found to be <u>inconsistent with sub-regulations (3) and (4)</u> is of no force and effect to the extent of the inconsistency.” This is clearly in error as no regulation can overrule the force of existing legislation.</p>
Bank accounts	<p>Further Recommendations:</p> <p>On the broader issue of Bank accounts, we recommend the following principles to address underlying concerns about how these bank accounts shall be operated:</p> <ol style="list-style-type: none"> 1. Any interest income earned by governments is a revenue source, which must be offset against expenditure in the following years budget estimates. That is, neither the National nor County governments can retain interest income separately from the budget estimates process.

Reference	Observation and recommendation
	<p>Thus, at each budget estimates cycle, interest income shall be counted a revenue source to meet expenditure estimates.</p> <ol style="list-style-type: none"> 2. Cost of operating various bank accounts should be offset against the interest earned and not expensed separately as a recurrent expense. Thus, it should <u>not</u> be included in any expenditure estimates in the budget. 3. The Treasury Single Account concept is not incompatible with a multiplicity of bank accounts. The TSA is a Primary Account and all other bank accounts are its Subsidiary Accounts with each account being the sole responsibility of an Accounting Officer. 4. The PFM Act - Section 119(2) gives all governments the freedom to bank with a commercial bank. Provided the interest income and banking charges rules mentioned above are followed, the process need not be complicated. <p>Section 119(2) “As soon as practicable, each County Treasury shall establish a Treasury Single Account at the Central Bank of Kenya or a bank approved by the County Treasury through which payments of money to and by the various county government entities are to be made”</p>
Cheques	<p>Cheque signatories shall be designated by the Accounting Officer and any changes in signatories shall be authorized by him.”</p> <p>Recommendation: Rephrase to read: “All cheque signatories <u>provided they are at least two</u>, shall be designated by the Accounting Officer and any changes in signatories shall be authorized by him.”</p>
Use of “Should” instead of “Shall”	<p>Recommendation: Regulations once passed are mandatory, for that reason and to remove further ambiguity, we recommend the substitution of indefinite terms such as ‘should’ for the prescriptive term ‘shall’</p>
Expenditure Estimates	<p>“Expenditure estimates shall be classified according to the approved standard chart of accounts that includes programmes, subprograms and economic classifications.</p> <ol style="list-style-type: none"> (2) Parliament and County Assemblies shall approve allocations of expenditure by programmes as the main division or category of a budget vote. (3) Approved budget allocations under a program shall be categorized into – <ol style="list-style-type: none"> (a) recurrent expenditure to include all current expenditure <u>including asset maintenance costs</u>; and (b) development capital expenditure to include all expenditures for acquisition, rehabilitation and improvements of assets and development of resources. (4) The Cabinet Secretary shall approve and issue a standard chart of accounts <u>as developed and certified by the Accounting Standards Board</u>. It shall contain all units of budgetary classifications applicable to both national county and county government entities. (5) The order of presentation of budgetary expenditure estimates submitted to Parliament and County Assemblies shall be in accordance with the budget guidelines and shall be consistent with the standard chart of accounts issued by <u>Accounting Standards Board through the relevant treasury</u>.
Regulations 123 (National Government), and Regulation 121 County Governments)	<p>General Comment: Calculating maximum payments to staff all general allowances should be included and not just overtime.</p>

Table 9 : Matrix Audit of the Public Finance Management Regulations (Cont'd)

Reference	Observation and recommendation
<p>Regulation 124 (National Government) and Regulation 122 (County Governments)</p>	<p>Recommendation: This regulation should be amended to state that “unless the members’ salary includes an “extraneous allowance”, no offer of compensation or ex-gratia payment in settlement of any claim against the Government may be made without a prior authority of the Treasury, except where powers are available to the accounting officer .</p>
<p>Regulation 161 (National Government) and 153 (County Government)</p>	<p>States that “The Head of Internal Audit shall enjoy operational independence through the reporting structure by reporting administratively to the Chief Executive Officer and functionally to the Audit Committee”</p> <p>Recommendation: This is confusing for the Head of Audit and likely to create unnecessary tensions. It would be easier and more natural to grant primary reporting responsibilities to the audit Committee with courtesy copies to the relevant treasury and the CEO.</p>
<p>Regulation 183 2) (National Government) and 174 (3)</p>	<p>Recommendation: These regulations should be amended either as: “A medium-term public debt management strategy shall be formulated annually on a rolling basis by the Cabinet Secretary or County Executive Committee <u>Member for Finance</u> “ or... “A medium-term public debt management strategy shall be formulated annually or on a rolling basis by <u>the National Treasury or County Treasury as the case may be.</u>”</p>
<p>Regulation 113 (National Government) and Regulation 111 County Government)</p>	<p>States that “An Accounting Officer who is desired by his Cabinet Secretary/ CEC Finance to make payment which for any reason believes to be wrong must represent his objection, and the reason to it to such Cabinet Secretary/CEC in writing. Provided the instruction to pay is then repeated, he may obey without further responsibility, the responsibility is then transferred to the Cabinet Secretary/CEC who will be held personally liable</p> <p>(2) after making the payment, the Accounting Officer should inform the Treasury of the circumstances and should copy the documentation to the Controller of the Budget and the Auditor-General.”</p> <p>This regulation is null and void as it sanctions an illegality.</p> <p>Recommendation: This should be redrafted to read: “An Accounting Officer who is desired by his Cabinet Secretary to make payment which for any reason believes to be wrong must represent his objection, and the reason to it to such Cabinet Secretary in writing. If the instruction to pay is repeated, the Accounting Officer shall repeat his or her objection and refer the matter to the Audit Committee for adjudication in writing. Upon the advice of the audit committee in writing and the advice of the audit committee approves the Cabinet Secretary’s request the matter shall be executed expeditiously. The Audit committee chairman shall immediately also issue a memorandum to the Auditor-General and the relevant for the record. In the event the Accounting Officer remains unconvinced, his other recourse shall be to make representations to the relevant treasury and the Clerk of the Assembly for the record and request further direction with a copy to the Controller of the Budget and the Auditor-General.”</p>

3.3 County Level Public Finance Management

The County public finance management process is provided for, in great detail, in the Public Finance Management Act (PFMA). As a result, a lot of county processes are carried out within the framework of the PFMA. This section examines the budget process and the Ward Development Fund.

Budget approval process: proposed amendments to the PFMA

With respect to the Budget, it is important that the County Assemblies be limited to approving the level of appropriations within each expenditure area, hence additional spending on one appropriation must be matched with corresponding spending cuts within the same expenditure area/sector. This is aimed at reducing the size of county assembly amendments to the government's budget.

Section 129 (3) The County Assembly Revenue and Expenditure estimates

The County Assembly Revenue and Expenditure estimates shall be accompanied with measures on cost, cost control and evaluation of results of programmes financed with budgetary resources and a statement of compliance with the ceilings determined by the Commission on Revenue Allocation (CRA).

131(1) - The county assembly shall consider the county government budget estimates with a view to approving them or rejecting them with proposals for amendments directed at the county treasury, in time for the relevant appropriation law and any other laws required to implement the budget to be passed by the 30 June in each year.

NEW CLAUSES: Section 131 – Further and in consideration of the county assembly Budget Revenue and Expenditure Estimates, the county assembly shall be BOUND by the need;

- i. to comply with the strategic priorities and policy guidelines including the budgetary ceilings and expenditure framework set out in the County Fiscal Strategy Paper.
- ii. to formulate budgets in a realistic and objective manner with due regard to the general economic outlook and revenue prospects, and the objective need to minimize deviations during the course of the year;
- iii. to maintain the balance between revenue receipts and the revenue expenditure including managing expenditure in a manner consistent with the level of revenue generated

(2) Any deviations from the County Fiscal Strategy Paper shall be documented and reduced into a memorandum shared with the County Treasury.

(3) In the event that the proposals deviate from the County Governments Medium Term Strategy, the county treasury shall have the power to reject the amendment proposals submitted to it for review.

131(2) – the county assembly shall alongside the county budget estimates; subject its estimates of expenditure to public review and recommendations.

131(3)(a) In consideration of the Estimates, the County Assemblies shall approve the level of appropriations within each expenditure area, and any additional spending on one appropriation must be matched with corresponding spending cuts within the same expenditure area/sector.

Specifically; the county assembly shall observe the following;

- i. Any proposal for a new project, policy or programme initiatives and measures that involve new or increased public expenditure, the county treasury shall be provided with a:

- a. detailed description of the proposed project or program and of its objectives and likely outcomes and impact.
- b. description of how the proposed initiative or measure complies with the strategic objectives and priorities of the County Government's Medium-Term Fiscal Strategy and the expenditure ceilings specified therein.

Additionally, the County Assembly should in the event of proposing a new project, policy or program initiative, ensure that it provides the county treasury with;

- i. a detailed description of the proposed project or program and of its objectives and likely outcomes and impact;
- ii. a description of how the proposed initiative or measure complies with the strategic objectives and priorities of the County Government's Medium-Term Fiscal Strategy and with the annual budget and the expenditure ceilings specified in the County Fiscal Strategy Paper.

NEW CLAUSE in the PFM Act:

Pursuant to the provisions of article 216 (2) of the Constitution, the county assemblies SHALL be bound by the recommendations of the CRA on expenditure ceilings and costs

2) A county assembly not in agreement with the CRA recommendations shall document and explain their disagreement including the necessary variations to be made provided that the county assembly shall still be mandated to carry out its fiscal and budgetary policies in line with best practices for sound and effective financial and asset management.

The following sections of the Public Finance Management Act (2012) require attention in order to enhance fiscal discipline and sound financial management.

Section 25 (2) on the Budgetary Policy Statement

There is need to have the Budget Policy Statement submitted for approval by 1 December to allow for County Treasuries to align their Fiscal Strategy Papers to the national fiscal framework determined in the Budget Policy Statement. The section should also be amended to require the National Treasury to submit to Parliament the Division of Revenue and County Allocation of Revenue Bills at the same time with the Budget Policy Statement and that the three documents shall approved at the same time by Parliament. This will allow the county governments enough time to determine their fiscal frameworks within the nation's fiscal limits and priorities over the medium term. Currently, the BPS is approved by 28 February while the County Governments are required to have prepared and submit the FSP to the County Assemblies by the same date and that the FSPs must be in line with the BPS. The Division of Revenue and County Allocation of Revenue Acts must be in place to allow rational prioritisation of medium term priorities in the FSPs.

Section 26 (1) Budget Review and Outlook Paper

Preparation and submission of the Budget Review and Outlook Paper by the National Treasury to the cabinet for Consideration, by the 30th of every September, each financial year. This paper ought to be published and publicized once it conforms to the process detailed out under section 26 of the PFM Act.

125 (1) (b) Financial and economic priorities

Planning and establishing financial and economic priorities for the county over the medium term; This section should be amended to require county governments to prepare Medium Term

Expenditure Framework (MTEF) Sector Reports as basis of establishing financial and economic priorities over the medium term. MTEF Sector Reports detail each sector’s performance for the past three years and forecast the priorities for the coming three years. The medium-term priorities are determined from the five-year County Integrated Development Plans (CIDP).

128 (3) (h) intergovernmental sector working groups

There is need to introduce a new subsection (h) that will require the county executive committee member for finance to include in the circular mechanisms of consultation with the intergovernmental sector working groups on budgeting requirements that border on Article 187 of the Constitution. This will ensure that the MTEF processes at the county government level respond to the budgeting needs that require intergovernmental agreements. This will ensure that the intergovernmental sector working groups are established as platforms of initiating implementation of intergovernmental agreements envisaged in Article 187 of the Constitution and the Intergovernmental Relations Act.

Section 129 (3) County Assembly Revenue and Expenditure estimates

County Assembly Revenue and Expenditure estimates shall be accompanied with measures on cost, cost control and evaluation of results of programmes financed with budgetary resources and a statement of compliance with the ceilings determined by the Commission on Revenue Allocation (CRA).

Under section 129 (4), replace “shall” with “may” to allow for exercise of discretion. This then means that the County Executive Committee member for finance has discretion to give comments or not.

Section 205 regulations under the PFMA

Powers of the Cabinet Secretary to make regulations for purposes of consistency and also the proper exercise of the responsibility to make regulations under the law, the PFMA should be amended to allow for regulations under the Act to be fully made by the Cabinet Secretary in consultation with all sector players. As it stands now, the Act also allows the County Assemblies to make regulations which responsibility they have not been able to fully undertake. This matter is also a law reform issue that ought to be subjected to further consultations amongst sector players.

A listing of the areas that the counties are called upon to make regulations include;

Public Finance Management Act (2012)	Section: County Assembly Power to make Regulations	Issue Addressed by the call for Regulations
	107(2)	Expenditure on Wages and Benefits.
	112	Payments out of the County Emergency Fund.
	116	Establishment, Operation and Winding up of County funds.
	120	Cash Management at County Level.
	127(2)	Regulations to provide for the content of the Annual Cash Flow Projections.
	154(3)	Regulations to provide for Reallocation of funds within sub-votes or programs.
	182(2)	County Regulations to provide for the establishment or dissolution of county operations.

Revision of county budget calendar in transition Years: (FY 2018-2019 for illustration purposes)

The latest budget calendar for fiscal year 2017-2018 was revised in view of the 2017 elections, with the final deadline for approval of the budget revised from end of June 2017 to end of March 2017.¹⁷

Following the same principles, adjustments should be made to the budget calendar for fiscal year 2018-2019, particularly for County Governments. The County Executive Committee member for finance is mandated (PFM Act, 2012, section 128 (2)) to issue a circular with guidelines and a budget calendar no later than August 30th and the first deadline in the county budget calendar is the submission by the Executive to the Assembly of the Annual Development Plan (ADP) “no later than September 1st”.

This deadline should be modified during transition years for two reasons. First, the County Assembly will have just been sworn in and it is unlikely that the County Executive Committee will have been constituted by end of August, certainly unable to make informed decisions. Secondly, the annual development plan to be tabled in this budget process will determine expenditures for the fiscal year 2018-2019, hence it should be based on the new County Integrated Development Plan (CIDP) 2018-2022, which is yet to be developed and approved by Counties.

It is therefore appropriate to recommend that the “no later than September 1st” deadline for the submission of the ADP is revised for transition years. Counties should be advised to prepare and table the ADP jointly with the CIDP, as the first annual development spending to be derived from the five-year integrated plan. This would ensure a more effective, efficient and informed unfolding of the planning and budgeting process of Counties after elections, assumptions of office, and inductions.

MODP is proposing December 31st as the deadline for the submission of draft CIDPs to the County Assembly, it is recommended that the deadline for the ADP in the revised budget circulars should therefore also be December 31st, or other earlier deadline a county might establish for the submission and approval of the CIDP.

The County Budget Review and Outlook Paper October deadline, October 21st, could remain unchanged – as the document will provide useful information for the planning and budgeting process – and similarly the February 28 deadline for the County Fiscal Strategy Paper (CFSP) and following steps of the budget calendar. Please note the mid-term planning process will provide critical information for preparation of the, ADP, CFSP ceilings, and budget estimates, as all these documents will be based on the sector programs formulated in the CIDP. This will ensure the proper link between planning and budgeting as mandated by law.

Since this problem could occur, especially during the General Election years, it may be necessary to provide for legal flexibility to avoid amending the any time the Budget Process is interrupted.

Clarity of Fund Transfers to County Assembly and Executive

When county funds are deposited or transferred into County Revenue Fund (CRF) which is managed by the County Executive Member for Finance (CEC Finance). There has been some incidents when County Assemblies have had difficulties accessing funds to deliver on their mandates, a situation which has been blamed on the CEC Finance, delaying release of funds. This has created misunderstandings that starve the County Assemblies of funds and thus affecting service delivery.

¹⁷ During the presentation of the revised budget calendar, Treasury Cabinet Secretary Henry Rotich on July 26, 2016, said that the objective of the calendar revision “is to ensure that the budget for the 2017/18 is appropriated in good time for smooth operation of the budget before and after the 2017 general election”.

To solve this problem, it is proposed that as CoB releases the funds from CRF, there should be clear indication as to the amount for both the Assembly and Executive. This will ensure there is no room for possible conflicts or hoarding of finances by the Executive at the expense of the County Assembly.

Operational Concerns in the County Budgetary Process

Supplementary budgets

Generally, a supplementary budget is an application to the National Assembly and County Assemblies for additional expenditure of public funds that was not appropriated and is mainly exercised in line with Article 223 and 224 of the Constitution and Sections 44 and 135 of the Public Finance Management Act. Under section 44 (3) of the PFMA, the supplementary budget should include a statement showing how the additional expenditure relates to the fiscal responsibility principles and financial objectives.

It is critical that there is a clear distinction between a supplementary budget as under Sections 44 and 135 of the PFMA and Budgetary Reallocations as envisaged under Sections 43 and 154 of the PFMA. It is increasingly becoming apparent that the national and county governments under the need for passing supplementary budgets, is undertaking more of budgetary reallocations as opposed to actual supplementary appropriations as envisaged under Articles 223 and 224 of the Constitution. With reference to Articles 223 and 224 of the Constitution, supplementary appropriations mainly relate to additional expenditures that are approved by Parliament, *ex post facto*. It does not deal with revisions or variations to the budget at the program, vote or sub-vote level which otherwise is the domain of the budgetary reallocations.

It therefore behoves the National Treasury and other industry players to be able to appreciate the legal and constitutional distinction that exists between supplementary appropriation and budgetary reallocation. Article 223 (5) also makes it clear that in any particular financial year, the national government may not spend more than ten per cent of the sum appropriated by Parliament for that financial year unless, in special circumstances, Parliament has approved a higher percentage. This further reinforces the argument that in so far as supplementary appropriation is concerned, it deals with expenditures and not variations or modifications to the budget for purposes of additional spending. That actually remains the domain of Budgetary reallocations.

As an attempt to merge current practice and the law, the PFMA (National) Regulations (2015) proceed to birth and define

- a. “Revised estimates” as the reference to the supplementary budget estimates and approved budget reallocations prepared and submitted under section 43 of the PFMA;
- b. supplementary budget estimates” means additional request of funds by the national government to Parliament.

Taking the above two into consideration, and as a way of dispelling any confusion that may arise with regards to the above two whilst also conforming with the dictates of the Constitution, it is critical that the PFMA is reviewed for purposes of specifically providing for the current practice of supplementary budget making. Seemingly, the involved institutions are conjoining supplementary appropriation and budgetary reallocation and globally referring to the two as supplementary budget making. This approach as it stands, is alien to the law.

Secondly, quite a number of concerns have been witnessed with regards to the manner in which the current practice of supplementary appropriation is conducted. As pointed out by the International Budget Partnership (IBP) Kenya:

“The budget documents that contain these changes mostly fail to justify the reasons behind them. This undermines the supplementary budget’s transparency and the quality of public deliberation around the changes. In addition, we note that the supplementary budget has not been widely available to the public, which of course further erodes the quality of debate over its contents. Finally, we find that in many cases where budgets have been revised downward, there is no corresponding decrease in the programmatic targets.

This suggests that government expects the same work to be done for much less money. Either the original estimates were inflated, which raises additional concerns about the probity of the budget process, or these targets are not realistic”.¹⁸

Basically, the concern has been that whereas supplementary budgeting may actually be unavoidable, it should never be used to meet short term needs which would otherwise have been planned and budgeted for. Unfortunately, both at the national and county level, we are witnessing increased levels of deviation from laid down fiscal responsibility principles and financial objectives to the extent that some government agencies habitually demand for or receive more funds in the course of the financial year through supplementary budgets. Allowing such practices creates room for lethargy among government institutions based on the fact that they formulate their institutional plans in lackadaisical fashion whilst well aware that they can always go back to parliament and get supplementary resources approved. It is unfortunate that a substantial amount of these monies is reportedly misused and thus undermining of service delivery to the people of Kenya.

Thirdly, as observed by a financial commentator, it is evidently clear the Government has adopted the habit of moving money from development to recurrent spending in total violation of the PFMA, which provides that funds appropriated for capital expenditure cannot be reallocated except for defraying other capital expenditure with the net effect of weakening the country’s fiscal position.

Proposed Criteria for Approving Supplementary Budget Proposals

As a core principle, supplementary budgets should only apply to expenditures that were unforeseeable, unavoidable and incapable of being absorbed. Consequently, and in addition to the criteria already provided for under the PFMA regulations, we are proposing the following issues as points for evaluation of or consideration of proposals submitted for supplementary budgeting.

1. Is the ‘expense’ simply a transfer of funding? If the action required is simply a shifting of funds from one ministry to another with a movement of personnel or function, this should be approved as it does not represent any new spending.
2. Can the expense be delayed until the next Budget? Preferably, all spending decisions would be made through the budget process, so if a proposal can be held over until then, it should not be considered for supplementary appropriation.
3. Is the expense unforeseen? Any expense that could (or should) have reasonably been foreseen should not be approved.
 - a. Does the expense represent ‘business as usual’? If the expense is something that is considered to be normal operational spending (including personnel), the ability of the ministry in question to manage their budget is in question, and the funding should not generally be approved.

¹⁸ What Does the 2015/2016 Supplementary Budget Say About Kenya’s Priorities? (April, 2016) – International Budget Partnership (IBP).

- b. Is the expense something ‘demand-driven’ and outside the control of the ministry? If the expense is for something outside the control of the ministry, this is generally more likely to be approved. However, care should be taken in determining if the ministry should have been able to control the particular expenditure.
4. Have there been offsetting savings proposed? All new spending proposals should contain offsetting savings to fund them. Ideally, these should match the years of expenditure. If there is no offset, this does not preclude a proposal from being approved, but a strong case needs to be made for diverting future funding away from other priorities in current or future budgets.

Programme Based Budgeting

The PFMA required both the national and the county governments to shift to program-based budgets (PBB) starting the 2014/15 financial year. Generally, program-based budgets organize the budget around objectives rather than inputs. A PBB presents a set of programs and (usually) subprograms with clear policy objectives. Each program has a set of indicators, which measure whether objectives are being achieved, and time-bound targets, which are related to each indicator and measure progress toward achieving these objectives.

Program Based Budgeting (PBB) in Kenya was mainly introduced and designed to support Public Finance Management (PFM) reforms by enhancing performance management and accountability. Additionally, it was meant to serve the purpose of bringing forth a stronger link between the annual budget and policy objectives whilst also improving transparency and access to budget information. The mainstay of PBB is the facilitation of the flow and quality of information that in a fundamental way forms the basis for resource allocation, decision making and the creation of an apt environment and mechanisms that strengthen the Public Finance Management framework.

It was also to enabling a stronger linkage between the annual budget and policy objectives, and improving transparency and accessibility of information. The aims of PBB are to mainly facilitate the flow and quality of information so as to provide a healthy basis for resource allocation decision making and to create the right environment and mechanisms that will strengthen the improved PFM.

Unfortunately, the implementation of PBB at both the national and county level is not without challenges even though the challenges are much more pronounced at the county level. The county governments (with little exception of the national government) have largely formulated PBB budgets that are not transparently linked to service delivery and performance. The concern therefore is that the shift to PBB has not been defined by qualitative information at their level. Others have resorted to producing line budgets and PBB budgets at the same time.

On balance, Kenya’s shift to PBB has made more information available. However, it also reduced the level of information available on wage costs and external funding. The narrative, indicators, and targets are still weak. In many cases, the sub-program breakdown does not allow a reader to fully understand what a sub-program does or how it uses public money to achieve specific objectives¹⁹.

The county governments have been hard hit with this shift for it is clear that they are still grappling in the dark in the hope of finding their way and abiding with the legal requirement upon which the shift to PBB is predicated. As with all transition, a shift from line item budgeting to PBB requires considerable input and involvement on the part of the involved institution.

19 IBP Guide: Improving Program Based Budgeting in Kenya (Jason Lakin and Vivian Magero) June 2015

It must be supported by an understanding of the old budget format, the new budget format, and the definitive components of an effective transition which include designing programmes, programme objectives, indicators and targets that are reasonable and achievable.

In a number of counties, rather than develop programmes with clear objectives, majority of them have developed programmes that are actually a thin gloss demarcating recurrent and development spending. It does not help that the programs are defined with generic narratives that are ideally not helpful including the fact that some of the indicators and targets that these counties conceptualize are incapable of measurement.

Therefore, there is need for technical assistance to the counties to help them transition from a line-item budget methodology to a properly undertaken PBB approach as is required under the law. The capacity should ideally, (though not exclusively) concentrate on the following issues:

- » Planning and the Medium-Term Expenditure Framework (MTEF) for purposes of enhancing the county government's understanding and proficiency in the application of MTEF in their budgeting processes.
- » Program-based budgeting: There is need to impart the county officers with the knowledge and skills that are critical for purposes of them being able to prepare their respective budgets by programs in tandem with the ideals of Program Based Budgeting.

Ward Development Fund

Just like the CDF, Members of the County Assemblies also want the establishment of the Ward Development Fund at the County level. Part of the arguments that they have proffered in support of their claims is that their constituents view them as agents of development and are therefore expected to contribute to and deliver on community projects within their political enclaves. To this end and taking into consideration the principle of public participation as a core value of the 2010 Constitution, the MCA's are thus expected to engage and support communities to identify, discuss and prioritize their needs including orienting or satisfying these needs through localized development processes.

The WDF in a very large way parallels the CDF at the national level and one of the principal arguments that have been advanced against their establishment revolves around the principle of separation of powers. That notwithstanding, there are a number of institutional and procedural safeguards that can be inbuilt into the WDF processes in a manner that ultimately respects the notion of separation of powers both in principle and in practice.

Ideally speaking, the arguments in favor of the WDF make sense and are not to be trashed. It is an irrefutable fact that the clamor for the WDF is precipitated by the desire to implement specific priority projects that have been identified by the residents of a particular ward as being quite germane to their wellbeing. Based on the arguments that have generally been floated, the primary purpose of the WDF is to support the construction and maintenance of small-scale infrastructure and development projects within the wards.

Some of these projects could include things like cattle dips, water projects or their maintenance, access roads inter alia. To this end, it is expected that the county governments sets aside some monies for such projects over and above the development planning that it engages in.

Going by global practices and also considering our burgeoning system of fiscal decentralization, the WDF is largely premised on the following objectives which include the need to:

- » improve the socio-economic status of rural people,

- » encourage people's participation in, and contribution to, community development at the lowest level possible, and in this case the ward level.
- » enable people to become more responsible for creating their own future.

The Key Determinants of these local levels projects include:

- » projects supporting economic development,
- » projects supporting social development
- » projects that do not exceed the allocated budget,
- » projects that are in line with the rules and regulations upon which the WDF should already be defined and pegged, and
- » projects that can be implemented within a fiscal year without the need for unnecessary spill overs into subsequent financial years.

With respect to project identification as a significant component of the WDF process, it must not be forgotten that the fund will always remain too small to be spread across the vast number of priority areas at the local level. It is possible that the funds shall mostly be used to fund rural infrastructure projects such bridges, drainage and water provision, and small connecting roads between villages.

Making the WDF work

An enabling legal, regulatory and policy frameworks are the key elements that are critical to a properly functioning WDF framework. It has been argued that laws and other regulatory instruments pertaining to the management of the WDF can hamper its success or delivery if poorly designed or executed. In a nutshell, A strong WDF regulatory framework is an important ingredient for the success of development programs.

Planning under the WDF should adopt a bottom-up approach. Generally, "bottom-up" or community-led development planning refers to putting community members at the center of development planning, through their views, and helping define the development course for their area, in line with their own views, expectations and plans. It is tailored to the local context and directly addresses the needs of communities. Therefore, the community must be involved throughout the development process from participating in deciding what is needed, how they want to achieve it, how they will implement it, to benefiting from the results of achieving it.

Thus, and in the spirit of the bottom up approach to development, it is crucial that the project priorities at the local level be integrated with the overall planning at the county level. If this is lacking, then such kind of priorities remain nothing other than a consolidated shopping list of local need and wants with very little evidence of strategic planning. Further, it must also be appreciated that WDF's wherever they are set up, are meant to compliment county planning and not to overlap or replace county planning which if otherwise not considered may potentially undermine, marginalize or duplicate the role of county governments in development planning. We must be careful to state that WDF is not a replacement for county planning and within its implementation, we must also not come up with a system that inordinately becomes expensive, unnecessary and burdensome to the county government.

Additionally, even though the projects that are implemented under the WDF are small in stature or nature, WDF should not be expended on a myriad of small, diverse projects that are largely of no long-term impact to the county development needs. This is the danger of a fragmented approach to development planning wherein projects of very little utility to the advancement of the county development needs are implemented by their droves.

Consequently, these identified priorities must be aggregated and incorporated into the county plans in such manner that ultimately ensures that county planning espouses local needs and priorities. Also, considering the size of the WDF and the small-time nature of the projects that it seeks to implement, it is of utmost importance that the following considerations are borne in mind when undertaking both project planning and implementation. It is useful that;

- » The projects under WDF to be implemented and concluded within the given particular financial year that they have been planned for.
- » Ensuring that the funds that are allocated for these projects as under the budget are not in any way diverted or allocated to other projects. This also serves the purpose of minimizing or altogether eradicating the instances of incomplete or stalled projects due to funds limitations.

Taking the foregoing into account, it therefore means that WDF must be preceded by a good measure of integrated local (ward level) and county planning measures. In this regard, county governments as part of making financing the WDF initiatives must also consider the following objectives and purposes into considerations as they undertake planning.

- i. Provide a simple but integrated framework for integration of these local level priority projects into annual county development plans and to the extent that it is feasible, into the County Integrated Development Plans.
- ii. Provide appropriate linkage and harmony between county development planning, local priorities and the county budgeting process including the aspect of project financing that comes with it. This is to ensure requisite funding for these projects as anticipated under the planning initiative.
- iii. Provide for the development of a Monitoring and Evaluation strategy for purposes of implementation/actualization follow ups especially within the financial year. It is useful if such an initiative is preceded by a work plan that to the extent possible, captures the project implementation cycle.
- iv. Though it may be a controversial matter, to the extent that the local circumstances warrant, it may be both practical and of value for the counties to undertake broad-based linkages between projects that are crosscutting in nature when looked at from the perspective of two or more wards. This is because;
 - a. Some of these projects may not be confined and implemented wholly within the geographical confines of a select ward but may be across wards. This is a possibility that the counties ought not to run away from and as such there should be room for its incorporation into development planning processes and frameworks.
 - b. It may also be a tool that is available for purposes of being able to limit possible instances of project duplication by intending to undertake programs within the ward that are already being undertaken within the larger county development planning processes.
- v. Provide for a communication and feedback strategy especially to the members of the public who are the key stakeholders within the service delivery prism.

It is also essential to place a funding cap on the WDF as a way of ensuring that it does not increase exponentially to the point of undermining related albeit significant development concerns of the county. Also, it is viewed that funding caps are instrumental in curbing the possible orientation of the funds towards funding political patronage. We must also be cautious to the extent that we do not assign insignificant amounts to WDF to the extent that the amounts become quite small and consequently being insignificant to deliver on substantial development projects.

Just like its predecessor the CDF, it is also vital that the WDF is based on a redistribution or equalization formula for fund allocation amongst the wards that at a minimum, considers population and poverty rates, inter alia. This would result in a more horizontally balanced distribution of the funds in the sense that it appreciates and considers the disparities that exist between the wards and in some cases in a very profound manner. It may also be useful to set aside a portion of the WDF to cover the operation/recurrent costs associated with its administration so that the full impact of the project's costs is internalized at the local level.

The guidelines of the Office of the Controller of Budget (OCOB) (No.26 of 2014) have helped the counties to establish the Fund while adhering to established laws. Basically, these guidelines spoke to the following issues:

- » The County Executive shall formulate the Bill or Regulations to operationalize and administrate the Ward Development Fund.
- » The Ward Development Fund shall only come into operation upon approval of the Bill or Regulations by the County Assembly.
- » Only the County Executive shall manage the Fund and Implement projects and programmes financed by the Fund. In the principle of separation of powers, MCAs shall not take part in this function.
- » Public participation is critical. County residents should identify priority projects that the Ward Development Fund should finance.
- » The MCAs shall monitor and play oversight on the appropriation of the Fund and the implementation of projects financed by the Fund. They shall also mobilize residents to identify priority projects for the Fund to finance.

Although the MCA's retain decision-making power in terms of being able to mobilize and prioritize projects at the ward level, project implementation and fund management remain outside of their control. This is in line with the doctrine of separation of powers. Consequently, a proper WDF law should:

- » Stipulate clear guidelines for fund management.
- » Be very specific on the allocation and usage of funds that it designates for expenditure at ward level.
- » Be very clear on the roles of both the executive and the legislature in project identification and implementation as a way of thwarting any breaches of the principle of separation of powers.
- » Stipulate a very clear financial reporting framework within it for purposes of both financial and public accountability.
- » Provide for Public Participation.

Table 10: Matrix Audit of the Ward Fund Act

Clause	Concerns on Bill	Possible solutions
3- Principle objects of the Bill		
(b) Provides mechanisms for identification of projects in Wards;	Interferes with the planning process in the Ward set out in the COK, the CGA and the PFMA	Integrate the WDF process in the County planning process
(c) promote the decentralization of functions and provision of services by county governments to the extent that it is efficient and practicable pursuant to Article 176 of the Constitution;	Though Constitutionally and statutorily expected to further decentralize as the case may be, this remains a county decision including the modalities of implementing article 176 of the Constitution.	Review this portion of the bill.
(d) to ensure equitable sharing of resources within the county;	The bill cannot purport to ensure this objective simply because the sharing of resources at the county level is a product of both planning and budgeting at the county level.	Review this portion of the bill by making equitable sharing of resources an expectation and not ensuring the same.
(f) provide a framework for the participation of residents in each county with respect to the application resources and the identification and implementation of projects through monies obtained from the resources allocated.	Public Participation is a county function and the framework for the conduct of public participation is largely provided for within the respective laws on public participation that a majority of the county governments have passed.	It may be useful for the bill to require the conduct of public participation without necessarily providing a framework for the conduct of the same.
5(1). Establishes a Fund in each County	Under Art 116 and Section of PFMA the creation of public funds in the County is the responsibility of CEC and CA of County	Oblige the CGs to establish a Fund in accordance with PFMA for the stated purpose
5(2)(a). Allocates 8% of revenue to the Fund	Considering the relatively low amounts of discretionary revenue available to CGs, this figure could starve County of development funds outside this framework	Reduce the percentage allocation OR make the amount a percentage of Development Expenditure
5(3) The COB prohibited from releasing Funds without complying with WDF Act	a. Creates bar to exercise of constitutional powers of the COB without constitutional foundation.	<ol style="list-style-type: none"> 1. Align with other compliance issues under PFMA. 2. It would be useful if the provision read; “No withdrawals shall be made out of the fund without the approval of the CoB”.
6. Creates a disbursement process managed by WDF Board	Creates a fund management framework outside the COK, CGA and PFMA framework	Process would have to be managed under existing County framework with CA oversight to ensure compliance

Clause	Concerns on Bill	Possible solutions
7(1), 13. Creates an account for monies under WDF	Opening of accounts and management thereof is provided for under PFMA	Law can mandate CEC to open account under the PFMA framework
7(2) (3) and Clause 13. Provides for signatories of accounts outside the CG framework	Interferes with powers of CGs under the COK, CGA and PFMA	The management of monies for projects can be carried out within existing CG framework with CA oversight to ensure compliance
8(1) Provides for equal allocation between wards	The Bill proposes equal sharing of funds which is in-equitable	Create a formula for sharing that recognises inter-ward differentials.
12 (c) The Auditor-General shall submit a report under subsection (1) to the Senate for consideration.	The section responds to the need for Audit but provides for the Auditor to submit the report to the senate. A Critical Question that arises; Why report to the Senate to the exclusion of the County Assembly and with respect to a county fund? This is irregular and runs contra to the need for the county assemblies to equally provide oversight over county funds.	It is important that the Section adheres to the provision of Section 116 of the PFMA on the administration and reporting with respect to county funds, at the county level.
13. Opening of Ward Accounts for each of the Ward in a county.	The account opening process ought to adhere to the process set out under section 119 of the PFMA. Also, the opening of accounts in commercial banks is a highly regulated affair at present.	Review the section.
17 (c). Composition of the Board	What is the relevance of competitive recruitment under the subsection including the involvement of the County Public Service Board? It unnecessarily lengthens the process especially when the section requires that the ideals of gender and special interests be factored into the recruitment process.	Provide for the procedure for selection and appointment into office based on suitability without necessarily involving the County Public Service Board.
24. Projects to be in respect of county government functions.	This section could do with greater specificity on the nature and type of projects that can be undertaken courtesy of the fund as intended to be established. As it stands, the only qualification is that the project falls within the realm of county functions and that it must be community based. This might be insufficient considering the fact that the fund might not be having lots of funds at its disposal.	Review the section to provide with greater certainty/specificity as to the kind of projects that can be funded out of these funds.

Table 10: Matrix Audit of the Ward Fund Act(Cont'd)

Clause	Concerns on Bill	Possible solutions
25. Project Account	The account opening process ought to adhere to the process set out under section 119 of the PFMA. Also, the opening of accounts in commercial banks is a highly regulated affair at present.	Review the section.
35 (1). Identification and Submission of Project Proposals – “The Committee shall be responsible for the identification of projects to be funded under this Act, including joint projects with other wards and stalled projects, and shall prepare a list of projects proposed to be implemented in the ward projects submission form prescribed in the Third Schedule.	The element of public participation as a crucial component to the process of identifying projects to be implemented courtesy of this fund is lacking.	Review and incorporate public participation as a requirement that defines the need for this fund’s existence. Based on the fact that the Fund seeks to address/deal with community-based projects, then it is vital that public participation be infused as a critical component of the process.

Public Audit Act 2015

Generally, this Act establishes the Office of the Auditor General which office comprises the Auditor General as its statutory head and all other staff appointed by the Auditor-General. In tandem with article 229 of the Constitution, the Act provides for the manner in which the Auditor-General audits and reports on the accounts of any entity that is funded from public funds at both levels of government.

On this law and for purposes of the legal audit, we were guided by the High Court decision in Petition No. 288 of 2016²⁰ which declared the controversial amendments to the Public Audit Act (2015), as unconstitutional. The amendments largely undermined the functional independence of the office of the Auditor General. Consequently, and based on the court’s declaration of the said amendments as unconstitutional, it was therefore not worthwhile discussing the same for they have no force in law.

Public Procurement and Disposal Act, 2015

Basically, this is an ACT of Parliament aimed at giving effect to article 227 of the Constitution to provide procedures for efficient public procurement and assets disposal by public entities at both the national and county level. Essentially, the Act was passed for purposes of implementing and giving greater prominence and clarity to article 227 of the Constitution. It must also be borne in mind that the current Act is largely a framework legislation, and therefore, quite a lot of its implementation is left to regulations for purposes of giving it greater effect. Unfortunately, to date, the much-needed regulations as mentioned above, are yet to be enacted into law hence the reliance on 2005 regulations that do not largely comport with the new constitutional and legislative order occasioned by the promulgation of the 2010 Constitution. This is highly unprocedural and thus ought to be remedied at the earliest. The national treasury ought to ensure that the regulations are laid before Parliament and passed for purposes of better management of Procurement and Assets Disposal at the public level.

20 High Court of Kenya (Milimani) – Transparency International vs The Attorney General and Two others (Interested Parties).



Article 203 on National Interest (for purposes of National Revenue sharing)

The term national interest in article 203(1) refers to a set of policies, goals, priorities, and resultant programs which have fiscal implications and which benefit the country as a whole.

The list of the National Interest policies and priorities that the country undertakes over a period of time ought to be agreed upon through a consultative process (preferably through an intergovernmental process) that includes the county governments since these programs have implications on the funding of the functions of the county governments. Such a process

These national interest policies and priorities once agreed should clearly be set out either in the National development plan Or the Medium-Term Expenditure Framework or such other document that clearly outlines these policy priorities and the timelines for their implementation.

The level of funding necessary to accomplish those “national interest” policies and priorities should be determined through the process outlined in the Public Finance Management Act which involves the Intergovernmental Budget and Economic Council.

In summary, the possible criteria for the evaluation of National Interest may include;

- » Projects/Programs that are critical to achievements of country’s economic development objectives
- » Projects/Programs that potentially have a significant impact of social well-being of citizens.
- » Anchored in the Vision 2030 and the Medium-Term Plans.
- » Have significant resource investment requirements
- » Are in line with the Fiscal Responsibility Principles under the law.

Public Debt and other Obligations

What are our debt obligations and how does the same impact on resources to be shared? The Constitution under article 214 (2) defines Public Debt to mean all financial obligations attendant to loans raised or guaranteed and securities issued or guaranteed by the national government. Loan repayments are also an obligation that cannot be overlooked and from a Public debt perspective, these loans are both domestic and external, create a national obligation and relate to borrowings done by both the National and County Governments. Provisions for debt repayment must be made in the National Budget including the debts that have been guaranteed by the national government for and on behalf of the county governments. The level of public debt has direct implications on revenue allocation to the county governments and on the borrowing component, out of the total debt ceiling, available to the county governments.

Other obligations

National obligations refer to those obligations that the National government may have and which affect the entire country. Excluded from this criterion are those obligations that arise as part of the National government’s functions. The obligations that are outside the National government functions would include for example the funding of the cost of shared institutions including the Judiciary, Parliament, constitutional commissions, and the cost of other national obligations, which do not directly relate to the functions under Schedule IV including expenditure on pensions. In line with this, it would be prudent for full disclosure of these other obligations by the national treasury.

The needs of National Government

There is Need for an objective Criterion for determining these needs of the national government and related costs of implementation. This mainly stems from the responsibilities and functions that are assigned the national government under the fourth schedule. The distinction between National Government Obligations and National Interest may at times be blurred in the sense that the national government may run functions, which are largely national in nature. The Constitution requires that the needs of the national government be determined through "objective criteria"; this phrase is intended to avoid the national government or indeed the County governments being the judge of the expenditure needed to finance their functions meaning that each level of government must exercise prudence in financing its functions and its developmental needs for purposes of revenue sharing under the Constitution. The CRA and other transitional management institutions are vital institutions that ought to be consulted as part of realizing this requirement under the Constitution.

The ability of Counties to perform Functions allocated to them

The schedule equally lays out the functions of the county governments to the extent that they are entrusted with the task of service delivery and adequate resources ought to be provided for purposes of financing those functions. Therefore, even as National Interest activities are identified and agreed on, it is important that these counties are not starved of resources that are critical to their proper functioning including service delivery.

Flexibility in response to Emergencies

The Constitution allocates to both National and County government the function of disaster management, which incorporates the management of emergencies at a national or county level and to this end, there is the expectation that both levels of government shall set aside funds to deal with emergencies that arise within their enclaves.

Weighting Criteria

The Constitution does not define how the criteria in Article 203(1) are to be weighted against each other, though it is vital that each of the criteria must be balanced against others noting however that there are some like public debt and other national obligations that require mandatory funding. But care must however be taken to ensure that even the mandatory obligations do not prejudice only one level of government but consider the other criteria.

County Planning

At the core of the development initiatives pursued by the county governments, lies planning and budgeting. It cannot therefore be gainsaid that proper planning and budgeting is an instrumental exercise that goes to the core of the abilities of the county governments to deliver on their respective functions and responsibilities including service delivery.

Currently, the County Government Act and the PFMA provide for a robust legal framework that defines the entails of planning and budgeting at the county level. Specifically, the County Government Act demands that public funds not to be spent outside of a planning framework. It also provides for the formulation of several plans that ultimately impact the budget process. Some of the plans that are provided for and governed by the County Government Act include the County Integrated Development Plan and the 10 years sector plans.

On the other hand, the PFMA in furtherance of the provision of article 220(2) of the Constitution also calls for the formulation of Annual Development Plans as part of the county budget process.

The specific plans that the law addresses itself are as follows:

- » Guidelines on ten-year Sector Plans (SPs) and five-year County Integrated Development Plans (CIDPs);
- » The SPs and CIDPs;
- » The Medium-Term Expenditure Framework (MTEF) sector reports;
- » The MTEF related documents including the Budget Preparation Circular (BPC), Annual Development Plan (ADP), County Budget Review and Outlook Paper (CBROP), the Fiscal Strategy Paper (FSP) and the Programme Based Estimates (PBEs)
- » The Appropriation Act;
- » The Finance Act;
- » The relevant revenue laws; and
- » Regulations and circulars.

The foregoing notwithstanding, there are still difficulties that are still being experienced at the county level within the aegis of planning. These difficulties and experiences are as discussed below:

Gaps in the overall Planning Framework

Generally, the CGA and the PFMA provide guidance on planning, budgeting and budget execution at the county government level. The overall legal framework has the following gaps.

First, while the CGA provides for a process flow for county planning; there is no requirement of such planning to flow from the Vision 2030 or the national development blue print in force at a given time for that matter. This requirement is necessary with regard to the flow of the PEM cycle. It should be recalled that the Vision 2030 defines the development priorities for Kenya and it would therefore remain important that the planning framework in the county governments must clearly address those priorities and with regard to the Fourth Schedule of the Constitution. Under the Political Pillar of the Vision, it was already envisioned (pre 2010) that Kenya would adopt a democratic decentralisation process with substantial devolution in policy making, public resource management and revenue sharing through devolved funds. So, it remains inevitable for the CGA to address planning at the county governments from the Visions 2030 priorities.

Secondly, the PFMA requires county governments to develop ADPs on annual basis. Seemingly, this then becomes the start of the MTEF process for county governments. During the first five years of devolution, county governments initiated their MTEF process from the ADP. This approach did not fully address the PEM cycle required linkages. The PFMA does not provide for establishment of Sector Working Groups (SWGs) as basis of guiding the sector approach to MTEF. However, regulation 30 of the Public Finance Management (County Governments) Regulations, 2015 (PFMCGR), provide that SWGs should submit sector reports to the county treasury in January. Not having SWGs in place and emphasis of a sector approach to the MTEF process yet another gap that has resulted in poor linkages between planning and budgeting. The MTEF sector reports ought to be done latest in September of the N year followed by the ADP, CBROP, FSP and PBEs.

Thirdly, as regards budget execution, section 17 (6) of the PFMA provides for quarterly disbursement of resources to county governments in the spirit of Article 219 of the Constitution that requires timely funding of devolved functions. Regulation 43 PFMCGR acknowledges that cash requirements have to be made on quarterly basis in that regard. This however is not the practice and flow of resources funding devolved functions is extremely constrained and subjected to many other conditions that actually negate Article 219 of the Constitution. This has further resulted in challenges in budget execution leading to pending bills and stalled projects.

Guidelines on Sector Plans and County Integrated Development Plans

Under the Political Pillar of the Vision, it was already envisioned (pre 2010) that Kenya would adopt a democratic decentralisation process with substantial devolution in policy making, public resource management and revenue sharing through devolved funds. It was envisaged in the Second Medium Term Plan (MTP II) that county governments would play a pivotal role in planning and implementation of projects and programmes of that MTP and the Vision 2030 through the preparation and implementation of SPs and CIDPs.

The National Government through the Ministry of Devolution and Planning (MoDP) would then develop guidelines for county governments to develop the SPs and CIDPs. However, no guidelines were developed to guide county governments in preparation of SPs as was for the CIDPs.

Upon review of the CIDP guidelines the following gaps and deficiencies were noted with regard to overall compliance and conformity with the Constitution and accompanying legal framework:

- » The guidelines were prepared with regard to the provisions of the Constitution and the CGA. However, there was no deliberate provision in the guidelines how the format of the CIDPs would respond to the Vision's Foundations of National Transformation and the three Pillars: Economic, Social and Political. Mere mention of Vision 2030 does not amount to responding to the economic blue print.
- » The guidelines provided for a lengthy approach to contents of the CIDPs that resulted in bulky documents that were not largely followed during the first five years of devolution. The resultant documents were nor readable and information would not flow in line with what was envisaged in Vision 2030.

The Medium Term Expenditure Framework

Review of the county PFM policies and legislations revealed that county governments prepare the requisite documents to guide the MTEF from the BPCs, ADPs, CBROPs, FSPs and PBEs. At each of MTEF stages policy documents are generated for onward approval by the respective executives and assemblies. Evidently, the MTEF processes are undergone for compliance purposes without regard to the required PEM linkages. As pointed out earlier, the PFMA does provide deliberately for an MTEF sector approach despite the passing mention in the PFMCGR. Emphasis remains necessary to have a sector MTEF approach beginning with MTEF sector reports that form basis of the subsequent MTEF process. The general gap in the MTEF policy documents is that they are not linked and the ultimate PBEs do are not build on the basis of the MTEF processes.

Budget Implementation Laws

In order to implement the budget, the appropriations law must be legislated. The audit revealed that county governments have the Appropriations Acts enacted to implement the respective budgets accordingly.

Another law that gives effect to the budget is the Finance Act. At this stage the audit revealed two main gaps: the content and applicability of the Finance Acts. The Finance Act is annual fiscal law that determines multiple provisions regarding the own sources of revenue the county government expects to collect in a fiscal year. The law principally provides for amendments of rates on existing revenue laws. Therefore, county governments are expected to have in place revenue laws prior to Finance Acts. The audit revealed that some county governments prepare Finance Acts yet they do not have in place revenue laws; yet other county governments refer to the revenue laws as Finance Acts. It was also noted that some county governments amended previous Finance Acts using current Finance Acts.

Article 209 (3) of the Constitution provides that a county may impose of property taxes, entertainment taxes and any other tax that may be authorised by an Act of Parliament. They also

impose charges on the services they provide. To give effect to this, county governments have passed various laws in that regard that form basis of annual Finance Acts.

Making County Planning more Effective

The following issues should be addressed as identified during the audit of county legislations and policies:

- » Despite the fact that the guidelines recognise that the Vision 2030 should be implemented through MTPs at the National Government and CIDPs at the County Government levels, there is no deliberate direction to have the CIDPs flow in the same format as MTPs with regard to addressing the Vision 2030 Foundations of National Transformation and its three Pillars; Economic; Social and Political.
- » The CGA does not make deliberate reference to Vision 2030 as the starting point for planning by the county governments.
- » The PFMA does not provide for sector approach to the MTEF process such that the MTEF sector reports would then form basis of the subsequent processes of preparing the ADPs, CBROPs, FSPs and PBEs.
- » Some county governments have not appreciated that they need to legislate revenue laws prior as basis of annual Finance Acts.
- » The implementation of the PFMA with regard to Section 17 (6) and the subsequent provisions in the County Allocation of Revenue Acts (CARAs) in that regard should not be optional in view of Article 219 of the Constitution.
- » Guidelines for SPs and CIDPs should be revised and subjected to peer review in bid to afford county governments clear planning frameworks that address the Nation's development blue print
- » Necessary amendments to the CGA and PFMA should be initiated to allow linkages between the planning and expenditure frameworks.
- » There is need to sensitise county governments to develop revenue laws pursuant to Article 209 of the Constitution and those laws will form basis of what Finance Acts ought to be.

4

AGRICULTURE

4.1 Introduction

Agriculture is the largest contributor to Kenya's Gross Domestic Product (GDP). According to the 2017 Economic Survey, the Agriculture sector (comprising Agriculture, livestock, fisheries, and the blue economy) contributed 31.3 percent of GDP in 2016, and has maintained an average of 27 percent through the years.²¹ A vast majority of Kenya's population (over 50 percent) are based in rural areas across the country and rely on subsistence Agriculture to support their livelihoods, making the sector critical to Kenya's overall socio-economic progress.

The new constitution and the devolved system of government significantly affect the agricultural sector. The Constitution of Kenya 2010 allocated a number of functions that were initially performed by the National Government Departments, Ministries and Agencies, to the county governments. Indeed, the Agriculture is one of the few sectors (along sectors such as Health) that are most significantly impacted by the devolved system of government. Matters/ areas of policy/law that touch on Agriculture that were affected by the current constitutional include:

- » Land use and natural resource management
- » The legal and policy framework for the wider agricultural sector;
- » Governance and the implementation framework as well as critical agricultural institutions;
- » Improvement of delivery of agricultural services and research;
- » Increasing of productivity and production and promoting commercialization particularly for crops;
- » Market access and trade; and
- » Participation by the private sector and non-state actors, in adherence to the public participation principle, in virtually all aspects of agricultural development.

In each of the areas above, both levels of government have varied roles, as elaborated by the Fourth Schedule to the Constitution. The Fourth Schedule contains a list of functions allocated to the National Government and the County governments.²² The Transition Authority elaborated on the functional areas that belong to the two levels of government via a gazette notice in August 2013,²⁴ the summary of which is provided below.

21 National Treasury 'Agriculture, Rural and Urban Development (ARUD) Sector Report' (January 2018)

22 Parts I and II

Table 11: Functional areas and powers in the Agricultural Sector

Functional Area	National Government Exclusive Powers	County Government Exclusive Powers
<p>Agriculture</p>	<ul style="list-style-type: none"> ▪ Agricultural policy ▪ Support agricultural research and promote technology delivery ▪ Regulation and quality control of inputs, produce and products from the agricultural sector ▪ Management of control of pests and disease in crops ▪ Promote management and conservation of the natural resource base for agriculture ▪ Promote market access and product development 	<ul style="list-style-type: none"> ▪ Crop husbandry <ul style="list-style-type: none"> ○ Extension services and farmer advisory services ○ Programs on food security ○ Grain storage structures ○ Enforcement of regulations and standards on quality control of inputs ○ Farm inputs ○ Soil and water management conservation ○ Credit and insurance for farmers ○ Management of agricultural training centres and agricultural mechanization stations ○ Land development services – water pans ○ Formulation and review of county specific policies ○ Development and enactment of legislation and regulatory frameworks for county specific policies ▪ Plant and animal disease control <ul style="list-style-type: none"> ○ Communal dipping and spraying operations and vaccination campaigns ○ Control of plant pests, diseases and noxious weed
<p>Livestock</p>	<ul style="list-style-type: none"> ▪ Veterinary policy ▪ Animal Husbandry ▪ Vector control and Zoological services ▪ Regulatory services (standards) ▪ Foreign policy and facilitation of implementation of international trade ▪ Consumer protection ▪ Protection of animals and wildlife ▪ Assurance of animal welfare ▪ Disaster management ▪ Capacity building ▪ Regulation of veterinary profession ▪ Veterinary extension services ▪ Development of animal resource information and data system ▪ Development of national livestock programmes and projects ▪ Promotion of market access and product development 	<ul style="list-style-type: none"> ▪ Animal husbandry <ul style="list-style-type: none"> ○ Livestock sale yards, county abattoirs ○ Livestock extension services to deliver husbandry technologies ▪ Veterinary policies <ul style="list-style-type: none"> ○ Implementation of national veterinary policies ○ Formulation of relevant county policies ▪ Sanitary Measure <ul style="list-style-type: none"> ○ Management of county abattoirs ○ Primary preventive health care – vaccination ○ Veterinary Clinical services ○ Implement disease control programmes ○ Disease Surveillance ▪ Vector control <ul style="list-style-type: none"> ○ Vector surveillance and control including tick and tsetse fly control ▪ Regulatory services <ul style="list-style-type: none"> ○ Control of animal movement (intra and inter county)

Table 11: Functional areas and powers in the Agricultural Sector (Cont'd)

Functional Area	National Government Exclusive Powers	County Government Exclusive Powers
	<ul style="list-style-type: none"> ▪ Oversight responsibility of state corporation and management of national institutions in the animal resource industry 	<ul style="list-style-type: none"> ○ Development of relevant county veterinary laws (by-laws) ▪ Foreign policy and implementation of international treaties <ul style="list-style-type: none"> ○ Implement international treaties for animal resource industry ○ Implement international standards on animal health, production and food safety ▪ Assurance of animal welfare <ul style="list-style-type: none"> ○ Implementation of animal welfare standards across all species and sectors- transportation, humane slaughter ○ Humane animal control and welfare (beyond scope of assignment as it mainly deals with dog licensing and population control strategies). ▪ Conservation and management of animal reproductive resources <ul style="list-style-type: none"> ○ Implementation of animal reproductive services including Artificial insemination ▪ Animal resource information <ul style="list-style-type: none"> ○ Collection and synthesis for county planning and reporting to National Veterinary Services ▪ Livestock programmes and projects <ul style="list-style-type: none"> ○ Development of county specific programmes and projects ○ Implementation of national livestock programmes and projects ▪ Promotion of livestock Trade- market access and product development <ul style="list-style-type: none"> ○ Develop markets and value addition infrastructure ○ Licensing of premises that sell meat, milk, hides, skins and other products of animal origin ○ Veterinary technical responsibility for livestock sale yards, markets and association infrastructure ○ Hides and skins improvement services ○ Implement standards for value addition to animal products including meat, milk, eggs, hides, skins wool and feathers ▪ Research and development <ul style="list-style-type: none"> ○ Participate in research agenda setting ▪ Disaster Management <ul style="list-style-type: none"> ○ Implement national disaster management

Functional Area	National Government Exclusive Powers	County Government Exclusive Powers
		<ul style="list-style-type: none"> ▪ Export establishment and ports of entry veterinary services <ul style="list-style-type: none"> ○ Counties in collaboration with National Veterinary Services will monitor export establishments and ports of entry veterinary services in their areas of jurisdiction. ▪ Collaboration with other institutions <ul style="list-style-type: none"> ○ Collaborate with department of Fisheries and Kenya Wildlife Services in matters of fish and wildlife health respectively <p>Collaborate with Ministry of Health in matters of zoonoses and one health approach</p>
Fisheries	<ul style="list-style-type: none"> ▪ Nation Ocean & fisheries policy and legislation ▪ National service guidelines ▪ Skills development of extension officers ▪ Coordinating international matters on protocols and conventions ▪ Digitization of gazette fish breeding areas and landing sites ▪ Deep sea fishing ▪ Zoning of aquaculture county specific disease control ▪ Promotion of fish quality assurance and national inspections ▪ Collection and management of national fish database ▪ Capacity building for county governments 	<ul style="list-style-type: none"> ▪ Fisheries extension service ▪ Up scaling sea weed ▪ County fish seed bulking units ▪ Fish health certification ▪ Fish landing stations and jetties, fish landing fees ▪ Demarcation of fish breeding areas ▪ Fish trade licensing and movement permits ▪ Fish production statistics ▪ Enforcement of regulations and compliance with management measures ▪ Implementation of fisheries policy ▪ Fisheries mentoring, control and surveillance ▪ Zoning of aquaculture county specific disease control and maintenance of fish auction centres

Source: Fourth Schedule, Constitution of Kenya, 2010 and Functional Analysis, Competency Assignment, Costing and Transfer of Functions by the Transition Authority

4.2 Agriculture Sector Legislation

Prior to the passage of the Constitution in 2010, the government, through the then Ministry of Agriculture, engaged in an ambitious project of consolidating the 131 pieces of legislation that governed the Sector. The project was conceptualized in order to bring policy and legislative order and in particular remove contradictions and obsolete laws. The key output the amalgamation of all the pieces of legislations into four laws. The laws are now in place namely: The Agriculture, Livestock and Food Authority Act, 2013 (ALFA), Livestock and Fisheries, Act 2013, Crops Act 2013, and the Agricultural Research Act 2013.

While a number of sector laws were repealed, not all laws were consolidated in the four laws that were passed shortly before the entry of county governments. As a result, we have pre-2010 laws (most of the laws being much older) and laws that were passed after 2010. However, the main laws governing the Agriculture sector were passed without substantial input from county governments.

Furthermore, after the passing of the Constitution, a presidential taskforce was put in place to review the place and status of parastatals (including agricultural sector institutions). The Presidential Taskforce Report on Parastatal Reforms completed its work in October 2013.²³ While the report has not been implemented, its contents and recommendations have a bearing on policy and legislative reforms in the Agriculture sector. Indeed, the report made specific recommendations for the agriculture sector institutions and this will be discussed.

The following list of Acts of Parliament touch on the provision of agricultural services in one way or another. The list is inclusive and not exhaustive. It includes Acts of Parliament enacted before and after the promulgation of the Constitution in 2010. They include the following:

- i. Agricultural Development Corporation (Cap. 444)
- ii. Agricultural Finance Corporation (Cap. 323)
- iii. Agricultural Produce Marketing Act
- iv. Agriculture Act
- v. Agriculture, and Food Authority (AFFA) Act 2013,
- vi. Animal Diseases (Cap. 364)
- vii. Animal Technicians (No. 10 Of 2010)
- viii. Biosafety (No. 2 of 2009)
- ix. Branding of Stock (Cap. 357)
- x. Bukura Agricultural College (No. 5 Of 1999)
- xi. Cattle Cleansing (Cap. 358)
- xii. Canning of Crops Act (Cap 328)
- xiii. Cereals and Sugar Finance Corporation Act, Cap 329
- xiv. Climate Change (No. 11 Of 2016)
- xv. Community Land Act
- xvi. Co-Operative Societies (Cap. 490)
- xvii. Crop Production And Livestock (Cap. 321)
- xviii. Dairy Industry (Cap. 336)
- xix. Ewaso Ng'iro North River Basin Development Authority (Cap. 448)
- xx. Ewaso Ng'iro South River Basin Development Authority (Cap. 447)
- xxi. Fertilizers And Animal Foodstuffs (Cap. 345)
- xxii. Fisheries Management And Development(No. 35 Of 2016)
- xxiii. Forest Conservation And Management(No. 34 Of 2016)
- xxiv. Forests (No. 7 Of 2005)
- xxv. Hide, Skin And Leather Trade (Cap. 359)
- xxvi. Irrigation (Cap. 347)
- xxvii. Kenya Meat Commission (Cap. 363)
- xxviii. Kenya Plant Health Inspectorate Service (No. 54 Of 2012)
- xxix. Kerio Valley Development Authority (Cap. 441)
- xxx. Lake Basin Development Authority (Cap. 442)
- xxxi. Land Act

23 Republic of Kenya, Executive Office of the President, 'Report of the Presidential Taskforce on Parastatal Reform' (October 2013).

- xxxii. Land Registration Act
- xxxiii. Meat Control (Cap. 356)
- xxxiv. National Cereals And Produce Board (Cap. 338)
- xxxv. National Drought Management Authority (No. 4 Of 2016)
- xxxvi. Pest Control Products (Cap. 346)
- xxxvii. Physical Planning Act
- xxxviii. Plant Protection (Cap. 324)
- xxxix. Price Control (Essential Goods) (No. 26 Of 2011)
- xl. Protection of Traditional Knowledge And Cultural Expressions(No. 33 Of 2016)
- xli. Pyrethrum (No. 22 Of 2013)
- xlii. Rating (Cap. 267)
- xliii. Sacco Societies (No. 14 Of 2008)
- xliv. Seeds And Plant Varieties (Cap. 326)
- xlv. Stock And Produce Theft (Cap. 355)
- xlvi. Sugar (No. 10 Of 2001)
- xlvii. Suppression of Noxious Weeds Act (Cap. 325)
- xlviii. Tana And Athi Rivers Development Authority (Cap. 443)
- xlix. The Crops Act 2013
- l. The Kenya Agricultural And Livestock Research Act 2013
- li. Timber (Cap. 386)
- lii. Tobacco Control (No. 4 Of 2007)
- liii. Uplands Bacon Factory (Cap. 362)
- liv. Wildlife Conservation And Management (No. 47 Of 2013)

However, some of these Acts of Parliament have been repealed. The following Acts of Parliament have been repealed by the Crops Act.

- a) Agricultural Produce (Export) Act (Cap. 319);
- b) Agricultural Produce Marketing Act (Cap. 320);
- c) Canning Crops Act (Cap. 328);
- d) Cereals and Sugar Finance Corporation (Cap. 329);
- e) Coconut Industry Act (Cap. 331);
- f) Coconut Preservation Act (Cap. 332);
- g) Coffee Act (No. 9 of 2001); and
- h) Cotton Act (Cap. 335);
- i) Crop Production and Livestock Act (Cap. 321);
- j) Pyrethrum Act (Cap. 340);
- k) Sisal Industry Act (Cap. 341);
- l) Sugar Act (No. 10 of 2001).
- m) Tea Act (Cap. 343);

The Fisheries Management Act has repealed the following Acts of Parliament:

- a) The Fisheries Act, Cap. 378;
- b) The Trout Ordinance, Cap. 380;
- c) The Fisheries Protection Act, Cap. 379

The Agriculture, and Food Authority (AFFA) Act 201 has repealed the following Acts of Parliament:

- a) Agriculture Act (Cap. 318);
- b) Suppression of Noxious Weeds Act (Cap. 325);
- c) Grass Fires Act (Cap. 327).

Other repealed Acts of Parliament include the following:

- i. Canning of Crops Act (Cap 328)
- ii. Cereals and Sugar Finance Corporation Act, Cap 329
- iii. Coconut Industry Act (Cap 331)
- iv. Coconut Preservation Act (Cap 332)
- v. Development and Use of Land Act (Cap 303)
- vi. Factories Act (Cap 514)
- vii. Lakes and Rivers Act (Cap 409)
- viii. Water Act.

In that regard, the audit will limit itself to those Acts of Parliament that affect agriculture and have not yet been repealed by any other subsequent Act of Parliament. These Acts of Parliament are the following:

Categories:

4.2.1 Pre-2010 legislation

As mentioned earlier, there are a number of laws that pre-date the current Constitution. **The Agricultural Development Corporation Act, Cap. 444** was enacted back in 1965 and it established the ADC Corporation whose functions are listed under section 12 of the Act. The functions of the ADC include:

- (a) Promotion of the production of Kenya's essential agricultural inputs and this may include: seeds and pedigree and high grade livestock including, hybrid seed maize, cereal seed, potato seed, pasture seed, vegetable seed, pedigree and high grade cattle, sheep, goats, pigs, poultry and bees;
- (b) Developing agricultural production in specific areas or specific fields of production; and
- (c) Participation in activities in agricultural production which are related to the primary and secondary functions of the Corporation and which in the view of the Corporation are commercially viable.

These responsibilities are vested exclusively in the national government with the minister in charge of Agriculture exercising most powers. For instance, under section 12 (3), the national ministers of agriculture and finance can decide to expand the operational areas of the ADC.

Looking at the distribution of functions between the two levels under the Fourth Schedule, the bulk of functions performed by the ADC belong to county governments. The fact that this Act predates the Constitution by many years means that the county government functions and powers have not been factored in the design and operations of the ADC.²⁴ Accordingly, there is a need for a fundamental revision of this law (and the restructuring of the ADC) to reflect the new constitutional structures for devolved government.

The Constitution does provide that pre-2010 laws can be re-interpreted to accord with the Constitution. However, there is a need for a comprehensive review of this in order to provide

24 See section 5 of the Act on incorporation and composition of the ADC.

specific clarity on the place and role of counties in the mandate of the ADC. Given that both levels of government have substantial roles in the agriculture sector, it is important that the representation of both levels of government is reflected in the structures and operations of the ADC. This, in itself requires a comprehensive review of the current legislation. The same (national and county collaboration) should also be reflected in the financing of the ADC.

The Agricultural Finance Corporation Act, cap. 323 laws of Kenya provides for the establishment of the AFC to assist in the development of agriculture and agricultural industries by making loans to farmers, co-operative societies, incorporated group representatives, private companies, public bodies, local authorities and other persons engaging in agriculture or agricultural industries. This is also one of the older laws that requires restructuring and realignment with the Constitution.

In the 2013 Parastatals Reform report, the taskforce recommended that the Agricultural Finance Corporation should, alongside other public financing institutions,²⁵ be merged to create a multi-sector financial and lending institution.²⁶ The main concern for recommending the merger in the report was to ensure that financing of planning is considered holistically in view of the Vision 2030 priorities.²⁷ However, in addition to Vision 2030 focus, there is a need to consider and ensure that the functions performed by the AFC, which affect counties have a county representation. Accordingly, representation of counties in structures of representation is important. Indeed, a re-thinking of the AFC objectives is required as the bulk of AFC functions (subsidies, sector development through financing, etc.) are functions that fall squarely within the counties' mandate. Thus, the recommendations of the Parastatals have to be re-examined in the context of county functions. Of course, the National Government plays an important role in agriculture (national) policy, national infrastructure, supervision, etc. however, this does not justify the continuance of pre-2010 processes and institutions. The structures and operations of the AFC should incorporate the constitutional provisions on the role of counties in sector functioning.

The Animal Diseases Act (1965) is one of the older laws dealing with animal health; functions that are allocated to counties under the Fourth Schedule.²⁸ Animal health belong to counties belong to the counties (except the regulation of veterinaries). The Act was passed before the counties came into place and therefore does not recognize the county level of government in its entirety.

The Branding of Stock Act (cap. 357) vests the Ministry with the main duty of branding of animals and also vests the former local authorities with a role of maintenance of brands within their areas of jurisdiction. These functions have all been vested in the county governments and the Act should be re-aligned with the Constitution to ensure that national policy aspects are vested in the national government and the execution of branding, where relevant is left to county government departments dealing with animal husbandry. Furthermore, the **Cattle Cleansing Act (cap. 358)**, which is concerned with the cleansing of animals infected with parasites such as ticks and other animal disease causing parasites, is also obsolete. It vests the function in the defunct Provincial Agricultural Board. The Act should be repealed and implementation of this function left to county governments with the national level retaining the national policy-making arena.

Among the older laws, there are pieces of legislation that establish various institutions whose functions are still relevant but also cut across the two levels of government. In many of the

25 Kenya Industrial Estates (KIE), Industrial and Commercial Development Corporation (ICDC), Tourism and Finance Corporation (TFC).

26 Parastatal Reform Report (2013) 94-95.

27 As above.

28 Section 1 of Part II of the Fourth Schedule provides that the following functions, others inclusive, shall be functions of the county level of government. That is: crop and animal husbandry, livestock sale yards, county abattoirs, plant and animal disease control; and fisheries.

institutions, the role of the national level is that of a broad policy-making role. For instance, the national government function of “national economic policy and planning” is broad enough to be reflected in these institutions. Accordingly, while some of the older laws should be completely repealed to pave way for new laws, this category of laws should not be completely repealed but institutions established under those laws should be reformed to include the county role.

The Dairy Industry Act (cap. 336), for instance, establishes the Dairy Board to ensure efficient production, marketing, distribution and supply of dairy produce, having regard to the various types of dairy produce required by different classes of consumers, improving the quality of dairy produce, securing reasonable and stable prices to producers of dairy produce, promoting market research in relation to dairy produce, among other roles. Since the Board plays a crosscutting role, the law should be revised to reflect the substantive role that both levels of government play in the mandate of the Board. The Hides, Skins and Leather Trade Act (cap 359) also regulates trade in the leather industry. There are national policy aspects and county aspects, where counties have the broad role of “animal husbandry” which includes regulation of trade in animal products, such as skins and leather. The Act should be amended to ensure the role and place of the two levels of government is reflected. In its current status, the content of the Act violates the institutional and functional integrity of the county level of government.

The Kenya Meat Commission Act, cap 363 establishes a commission, under the national government, to purchase cattle and small stock, and to acquire, establish and operate abattoirs, meat works, cold storage concerns and refrigerating works for the purpose of slaughtering cattle and small stock, processing by-products, preparing hides and chilling, freezing, canning and storing beef, mutton, poultry and other meat foods for export or for consumption within Kenya, and to confer certain exclusive rights upon the Commission.

The functions of the Kenya Meat Commission, as listed in the short title and under section 9 of the Kenya Meat Commission Act are similar to those provided to the county level of government under the Fourth Schedule of the Constitution. These include the function of “animal husbandry” and the construction of “abattoirs” which are part and parcel of the agriculture function. Being an old law, it does not recognize the role of county governments. Some of the functions that the Commission carries out are functions under “agriculture” as apportioned to the county level of government under Part II of the Fourth Schedule. The law requires fundamental revisions in order to ensure that some of the components of the functions that belong to counties are left to county laws and policies while providing for joint processes in areas of concurrency between the two levels of government.

The Animal Technicians Act, No. 10 of 2010 provides for the training, registration and licensing of animal technicians, and the regulation of the standards and practice of the profession of animal technicians. The Act generally provides for professional regulation, which is a function that falls under the national government (section 7(b) of Part II of the Fourth Schedule).

The National Cereals and Produce Board Act, cap. 338 provides for the regulation of the controlling of the collection, movement, storage, sale, purchase, transportation, marketing, processing, distribution, importation, exportation, disposal and supply of maize, wheat and scheduled agricultural produce. The NCPB, which is established under the Act is expected to regulate and oversee trade in cereals and ensure consumer requirements are met. The NCPB also has a role to advise the minister on cereal production. Counties have the function of “crop husbandry” under the Fourth Schedule and this involves production of maize, wheat and other scheduled crops, the processing and collection of these crops that fall within the definition of crop husbandry. Therefore, the NCPB Act is one of those laws that require fundamental revisions to ensure that the role of counties is recognised and incorporated in the provisions of the law.

The Pest Control Products Act, cap. 346 sought to regulate the importation, exportation, manufacture, distribution and use of products used for the control of pests and of the organic function of plants and animals and for any other connected purposes. As a result, the contents of the Act cut across the two levels of government: “international trade” and the national government regulation of the use of products used for the control of pests. The county governments have a role of “plant and animal disease control” and pest control is a component is a component of plant and animal disease control function. The Act should be revised to recognise the role of counties in pest control and joint structures where the functions provided for under the Act intersect.

A related law, the Plant Protection Act, cap. 324 provides for the prevention of the introduction and spread of disease destructive to plants and vests the national ministers with powers to regulate this function. The county government function of “plant and animal disease control” is not recognised in the Act as this also belongs to the older (pre-2010) laws.

The Seeds and Plant Varieties Act, cap. 326 is an Act of Parliament similar to the Protection of Traditional Knowledge and Cultural Expressions Act (No. 33 of 2016) as it concerns itself with intellectual property rights relating to seeds in as far genetic selection is concerned among other things. It confers power to regulate transactions in seeds, including provision for the testing and certification of seeds; for the establishment of an index of names of plant varieties; to empower the imposition of restriction on the introduction of new varieties; to control the importation of seeds; to authorize measures to prevent injurious cross-pollination; to provide for the grant of proprietary rights to persons breeding or discovering and developing new varieties; to establish a national centre for plant genetic resources.

These have a bearing on the agriculture function of the county level of government. This is because crop husbandry relies on the seeds and plant varieties allowed by law to be propagated in farms. The function of regulating matters relating to intellectual property falls under the national government as provided for under section 12 of Part I of the Fourth Schedule.

Therefore, the Act does not violate the functional and institutional integrity of the county level of government because it concerns itself with intellectual property matters relating to seeds and plant varieties; function of the national level of government.

A good example of realigning laws on areas of concurrence is the **Fertilizers and Animal Foodstuffs Act cap 345**, which was amended to include the representation of counties in the Fertilizers and Animal Foodstuffs Board. The functions of the board include: regulating fertilizers and animal foodstuffs industry in Kenya including the production, manufacture, packaging, importation and marketing of fertilizers and animal foodstuffs, and regulating the importation of raw materials for the manufacture of animal foodstuffs, among other roles. The Board also promotes cooperation among stakeholders and the inspecting of animal foodstuff and safety assurance. Accordingly, it is important that the body (which performs functions that cross national and county functions) is overseen by both levels of government.

The Meat Control Act is an Act of Parliament that enables control to be exercised over meat and meat products intended for human consumption, and over slaughterhouses and places where such meat is processed. It also provides for import and export control over such meat and meat products. The thrust of the Act is to provide policy regulation in the handling of meat meant for human consumption domestically as well as export. While issues such as health policy and international trade are mainly national government functions, it is inevitable that the two levels have inter-penetrating roles, whether it is implementation or enforcement of standards or even the actual provision of slaughterhouses and abattoirs. Therefore, the Act should also be revised to provide for the place and role of the two levels of government.

A related Act is the **Biosafety Act (no 2 of 2009)**, which regulates research into, and minimising the risks that may be posed by, genetically modified organisms and ensuring an adequate level of protection for the safe transfer, handling and use of genetically modified organisms that may have an adverse effect on the health of the people and the environment. The Act is also meant to establish a transparent, science-based and predictable process for reviewing and making decisions on the transfer, handling and use of genetically modified organisms and related activities.

While the Act largely provides for national government processes, such as, approvals of applications to introduce any genetically modified organism to the environment, these functions can only be performed well by recognising the role that counties play in human health. The Act should, thus, be amended to provide for representative structures for both levels and provide for means through which county functions related to biosafety can be implemented in collaboration with county governments.

Bukura Agricultural College Act (no. 5 of 1999) establishes Bukura Agricultural College for purposes of providing, in collaboration with other institutions of higher learning, facilities for education in agriculture and other ancillary subjects through the integration of teaching, research and effective application of extension services. The institution is meant to pursue research and innovation in Agriculture and provide training and certification in the area of agricultural education. There are 28 Agricultural Training Centres (like Bukura) that are established across the country.²⁹ The pre-2010 Ministry of Agriculture established most of these institutions before 2010. There are seven others that were in the process of being established as at 2013. However, it is only Bukura Agricultural College that is established via legislation. The Transition Authority decided to transfer these institutions to counties via a gazette notice in 2013.

However, capacity development and higher education, which these institutions provide, is a national government function. Accordingly, there is a need for an overarching national and county legal framework that will not only bring all the institutions under one regulatory regime but also provide for the respective responsibilities (especially in shared areas) for the two levels of government.

This a number of other Acts of that establish regional development authorities and which seem to impact on the operations of the Agriculture Sector. These Acts, which are six in number, are:

- a. **Kerio Valley Development Authority (KVDA) Act, Cap 441**
- b. **Lake Basin Development Authority (LBDA) Act, Cap 442,**
- c. **Tana River and Athi River Development Authority (TARDA) Act, Cap 443,**
- d. **Ewaso Ngiro South River Basin Development Authority (ENSDA) Act, Cap 447**
- e. **Ewaso Ngiro North River Basin Development Authority (ENNDA) Act, Cap 448**
- f. **The Coast Development Authority (CDA) Act, Cap 449**

Regional development Authorities carry out functions such as the implementation of irrigation schemes, setting up of crop plantations as a means of lifting some regions out of poverty. Their activities run into the depths of the functional integrity of county governments. As such, they perform functions meant for county governments.

The reason that made it necessary for the creation of the Regional Development Authorities was to enhance the co-ordination and planning in the management and utilization of natural

29 TA Gazette notice.

resources that are not confined to administrative boundaries but linked to drainage basins. The subdivision of regions along geographical lines is significant in terms of economic exploitation of natural resources across administrative boundaries in that it removes politics from the centre of economic development and thus allows for smooth planning and participation.³⁰

Considering that such authorities perform their mandate in multiple counties, there is the need for these regional development authorities to adopt and assume the make-up of governance under the new constitutional dispensation. Specifically, the 47 county governments have entered into arrangements, which create regional blocs that generally align with these Regional Development Authorities (RDAs). The next step, therefore, is to identify functional and operational aspects of these RDAs that can be subsumed or performed in collaboration with the coordinating entities of the regional blocs of counties. This is necessary for two reasons. First, there are aspects of functions that the RDAs perform that are either concurrent or county functions. Secondly, the constitutional spirit of cooperation and collaboration should reflect in these institutions.

4.2.2 Post-2010 Legislation

As earlier mentioned, the government had commenced a process of reviewing Agricultural sector legislation prior to the adoption of the new Constitution. This process led to the repeal of the Agriculture Act, cap. 318. Among the laws that were the products of these reforms is the Agriculture and Food Authority Act 2013. The Act establishes the Agriculture and Food Authority, a body composed of national government representatives from the various ministries.³¹ While section 4 seems to provide broad policy-making functions in the agriculture sector, which is the mandate of the national government under the Constitution, section 22 of the same Act seems to vest functions of county governments in the AFFA. The said section provides for “rules on preservation, utilization and development of agricultural land.” Under Part I of the Fourth Schedule, the national government is charged with the function of coming up with “agricultural policy” whereas under section 1 of Part II of the Fourth Schedule, the county level of government is granted the function of “agriculture” which includes: crop and animal husbandry, livestock sale yards, county abattoirs, plant and animal disease control; and fisheries.

In the case of *Council of County Governors v Attorney General & 4 others* [2015] eKLR, the court stated that a function allocated to a county government “must encompass all elements of the term” [143]. Thus, section 22 of the AFFA Act has to be revised to ensure that it does not infringe on the functions of the counties. Specifically, all aspects of implementation of rules meant to enhance crop husbandry should be a preserve of the county governments. Where there is a need for concurrency, the Act should reflect this.

The AFFA is one of the Acts that was developed in the process of enactment of the new Constitution. While it was enacted after the passing of the Constitution, counties did not participate in the development of the legislation. The Act should be revised to provide for county representation and functions assigned to counties in the Act should be moved to county legislation and policies.

The Fisheries Management and Development Act, No. 35 of 2016 provides for the protection, management, use and development of aquatic resources in a manner that is consistent with ecologically sustainable development. The Act also seeks to uplift the living standards of the fishing

30 Alice Karanja and Dr. L.S. Mulongo ‘Contribution of Regional Development Authorities in Rural Development in Kenya: The Case of Kerio Valley Development Authority’ (2011) 3 International Journal of Current Research 178-179.

31 Section 5, membership is composed of ministries of agriculture, lands, cooperatives, the National Land Commission, ministry of devolution, among other ministries

communities and to introduce fishing to traditionally non-fishing communities and to enhance food security. Specific goals of the Act are sustainable use of aquatic resources and enhancing economic activities of fishing. The Act establishes bodies to carry out various functions. These include: the Kenya Fisheries Advisory Council which includes a representative of the Council of Governors.

The Council's mandate is to review and advise the national Government on policies in relation to the co-ordination of fisheries management in relation to the aquatic environment and human dimensions and the allocation and access to fisheries resources. Other functions include intergovernmental agreements and arrangements related to fisheries, research, education, capacity development in fisheries and the management of fisheries resources, and management plans and resources for the development of the fisheries sector.

The Act also establishes the Kenya Fisheries Service whose main roles include: raising revenue through levies, fees, and investments, undertaking the development of appropriate fisheries infrastructure, that relates to its mandate under this Act and the Constitution, and facilitating investment in commercial fisheries, in collaboration with relevant agencies, persons or bodies, including Government departments. The Director-General of the Kenya Fisheries Service may, in consultation with County governments and other appropriate agencies provide a national framework of extension and training services, conduct research and surveys, and promote co-operation among fishers. The Fisheries Service may also engage in fish marketing, fish stocking, and alternative livelihoods among the fishers.

There is no denying that the national government has substantial roles in environmental protection and the economic activities of fishing communities. However, county governments have an even more direct role in promoting fishing as one of the local economic activities. Accordingly, there is no justification in infringing on the role of county governments. Counties that are host to fishing communities have a role of planning and national laws, as opposed to taking up the space, should facilitate facilitating the sustenance of such activities.

The Kenya Agricultural and Livestock Research Act 2013 establishes the Kenya Agricultural and Livestock Research Organization (KALRO) to provide for organs of the Organization and to provide for the co-ordination of agricultural research. The purpose of KALRO is to promote, streamline, co-ordinate and regulate research in crops, livestock, genetic resources and biotechnology in Kenya. KALRO is also expected to promote, streamline, co-ordinate and regulate research in crops and animal diseases; and expedite equitable access to research information, resources and technology and promote the application of research findings and technology in the field of agriculture.

The national government has a duty to promote and enhance research and this law enables the government to pursue this function. However, given that counties perform extensive functions in livestock development, it is important to facilitate the involvement of counties in the development of the research agenda and collaboration in research with county governments as partners. Inevitably, county governments are the primary consumers of the products of KALRO and this has to be reflected in the structures and operations of the organisation.

The Kenya Plant Health Inspectorate Service establishes the Kenya Plant Health Inspectorate Service (KEPHIS) as a regulatory body for the protection of plants, seeds and plant varieties and agricultural produce. The functions of KEPHIS include: administration and enforcement of sanitary and phytosanitary measures, and the administration and enforcement of food safety measures. Specific areas of responsibility include: the setting up service laboratories to monitor the quality and levels of toxic residues in agro-inputs, irrigation water, plants, soils and produce and international obligations relating to plant variety protection. KEPHIS, thus, performs functions

that are mainly related to the national government such as policy and research. However, given the heavier role of counties in agriculture, it is important to incorporate county representation and participation in KEPHIS structures and processes.

A similar case is that of the **National Drought Management Authority, Act No. 4 of 2016**. The Act concerns with ending drought related emergencies in the country. It has bearing in matters related to agriculture because Kenya relies on rainfed agriculture and any cases of prolonged drought have a bearing on the overall wellbeing of the county government on “agriculture” on crop and animal husbandry. The Act incorporates representation of the Council of Governors and this provides a basis for collaboration with counties in mitigating drought related disasters, a concurrent function under the Fourth Schedule.

The Pyrethrum Act 2013 repealed the earlier Pyrethrum Act, Cap 340 and provides for the development, regulation and promotion of the pyrethrum industry, through the Pyrethrum Regulatory Authority. The regulatory function includes the development and promotion of the pyrethrum industry, registration of processors, formulators and persons running pyrethrum nurseries, co-ordination of the activities of stakeholders and organizations within the pyrethrum industry, and setting the required standards for pyrethrum products. Other functions covered in the law include ensuring equitable access of benefits, research, dispute resolution, etc. The functions are regulatory/ policy in nature and belong to the national government. However, counties play an important role in the planting and growing of pyrethrum and should, thus, be involved in the formulation and enforcement of these policies.

The Crops Act 2013 seeks to accelerate the growth and development of agriculture in general, enhance productivity and incomes of farmers and the rural population, improve investment climate and efficiency of agribusiness and develop agricultural crops as export crops that will augment the foreign exchange earnings of the country. This is to be achieved through promotion of the production, processing, marketing, and distribution of crops in suitable areas of the country. Specific ways provided for in the Act include: circumventing unnecessary regulatory bureaucracy in the crops subsector, reduction of unnecessary levies, taxes or other barriers to free movement of crop products and provide for a rationalized taxation system, and reducing unnecessary regulation in the crops sub-sector, among other means. Crops covered include: Sugarcane, Tea, Coffee, Rhodes grass, Irish potatoes, Cotton, soya beans, beans, barley, finger millet, Sunflower, maize, pearl millet, rice, sorghum, wheat and pasta wheat.

Section 6 of the Act provides for the role of national and county governments in development of crops. It states that pursuant to the Fourth schedule of the Constitution the Agriculture and Food Authority, on behalf of the national government, shall be responsible for licensing and charging of levies and breeder royalties on all scheduled crops on condition that the total sum of the levies charged by the Authority shall not exceed ten per centum of the gate value of the produce.

It goes ahead and states that county governments will implement the national government’s policies to the extent that the policies relate to the county and in particular shall be responsible for—

- (a) development of crops grown within the county;
- (ii) plant disease control;
- (iii) markets;
- (iv) cooperative societies within the county;
- (v) soil and water conservation.

The function of the national government is limited to the setting up agricultural policy. The Act recognizes that but goes ahead and provides that the national government shall be responsible for the licensing and charging of levies and breeder royalties on all scheduled crops.

This section conflicts with section 17 of the Act which provides that Taxation of scheduled crops

(1) Pursuant to Article 209 of the Constitution, only the national government may impose, in relation to a scheduled crop—

- (a) income tax;
 - (b) value-added tax;
 - (c) customs duties and other duties on import of agricultural and aquatic products; and
 - (d) excise duty.
- (2) A county government may, pursuant to the Fourth Schedule of the Constitution, impose fees for—
- (a) development of agricultural crops within the county;
 - (b) development and regulation of scheduled crop markets within the county;
 - (c) issuance of trade licences to any person trading in scheduled crops within the county; and
 - (d) issuance of licenses for cooperative societies dealing with scheduled crops within the county.
- (3) The fees imposed by a county government under subsection (2) shall not in any way prejudice national economic policies, economic activities across county boundaries or national mobility of goods, services, capital or labour.

Therefore, in order to recognize the institutional and functional integrity of the county level of government, section 6 of the Act must be amended to reflect the fact that “agriculture” is a function of the county level of government and any charges and levies not related to income tax, import duty, excise duty and value added tax are imposed on the crops by the county level of government.

Table 12: Matrix Audit of Agriculture Sector Laws

Act/Policy	Issues	Rationale	Recommendations
Agricultural Development Corporation (ADC) Act (Cap. 444)	<p>Violates Article 6(2) which states: “The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation.</p> <p>It violates Article 186(4) on the functions of the county level of government.</p>	<p>Agriculture is a county government function and the Act does not recognize this. Section 5 of the Act provides for the membership of the Corporation’s Board but the county level of government is not recognized.</p> <p>Section 12(3) does not recognize the role that county governments play in the provision of agricultural services as stated in section 1 of Part II of the Fourth Schedule since it does not recognize the counties not representatives of the county governments by stating that the Minister of Agriculture in consultation with the minister in charge of finance shall instruct the Corporation to initiate, assist or expand any undertaking which it considers economically or otherwise unsound.</p> <p>It is also not clear on where the Development Corporation gets its funding. Considering that this a function of county governments, it is not clear whether the money apportioned to the corporation is a cut from the equitable share of money apportioned to county governments under Article 202 of the Constitution or if such funds, apportioned to the corporation, can be directly apportioned to county governments since agriculture is a county government function.</p>	<p>The Act should be amended to:</p> <ol style="list-style-type: none"> Recognize the county level of government in the Corporation’s Board. State where its funding comes from that is, whether it comes from the Consolidated Fund or the equitable share given to either level of government. The Corporation’s function should be limited to capacity building for the county government’s agriculture function.
Agricultural Finance Corporation (AFC) Act (Cap. 323)	<p>The Act violates that functional integrity of the county level of government.</p>	<p>Agriculture is a county government’s function but section 3(2) does not recognize the institutional and functional integrity as per Article 189 of the Constitution by failing to provide for county governments’ role in the Board of Directors of the Agricultural Finance Corporation.</p> <p>This is a creation and assignment of roles to an entity outside the structures of governance established under the Constitution is antithetical to the principles of</p>	<ol style="list-style-type: none"> The Act should be repealed since it creates and assigns duties to an entity that is outside the established structures of governance under the Constitution. Alternatively, the Act can be amended so that it roles are limited to capacity building for the

Table 12: Matrix Audit of Agriculture Sector Laws (Cont'd)

Act/Policy	Issues	Rationale	Recommendations
		<p>the Constitution as it threatens to violate the functional competencies of county governments.</p> <p>It also violates the principle distinguished by courts that bodies such as AFC (which usurp the powers of county governments by duplicating functions apportioned to county governments by the Constitution) must be dissolved or wound up as the Constitution has rendered the roles that they were playing prior to the promulgation of the new Constitution redundant.</p> <p>It is also not clear on where the Finance Corporation gets its funding. Considering that this a function of county governments, it is not clear whether the money apportioned to the corporation is a cut from the equitable share of money apportioned to county governments under Article 202 of the Constitution or if such funds, apportioned to the corporation, can be directly apportioned to county governments since agriculture is a county government function.</p>	<p>c. county governments in matters related to the agriculture function of the county level of government.</p>
<p>Agriculture, And Food Authority (AFFA) Act 2013</p>	<p>The Act violates the functional integrity of county governments.</p>	<p>Under Part I of the Fourth Schedule, the national government is charged with the function of coming up with “agricultural policy” whereas under section 1 of Part II of the Fourth Schedule, the county level of government is granted the function of “agriculture” which includes: crop and animal husbandry, livestock sale yards, county abattoirs, plant and animal disease control; and fisheries.</p> <p>However, section 22 seeks to perform the functions of county governments as it seeks to give the national government the function of making rules on how agricultural land at the county level should be utilized thus going beyond the</p>	<p>The Act should be amended by repealing section 22 of the Act as the section gives the national government powers to perform functions that are not “policy-making” in nature thus leading to a violation of the functional and institutional integrity of the county level of government.</p>

Act/Policy	Issues	Rationale	Recommendations
		policy making function of the national level of government.	
Animal Diseases Act (Cap. 364)	The Act does not recognize the county level of government in its entirety and nor does it recognize <u>the institutions set up under the county level of government.</u>	The Animal Diseases Act provides for matters relating to the diseases of animals. This is a function of the county level of government.	The Act should be amended to reflect the fact that “animal disease control” is a function of the county level of government.
Animal Technicians Act (No. 10 of 2010)	No issue. The Act does not impeach on the functional and institutional integrity of the county level of government.	<p>This is an Act of Parliament “to provide for the training, registration and licensing of animal technicians, to provide for the regulation of the standards and practice of the profession of animal technicians, excluding matters concerning animal health and food safety, and for connected purposes.”</p> <p>It is an Act of Parliament within the meaning of “Veterinary policy” under section 30 of Part I of the Fourth Schedule. It is also an Act of Parliament within the meaning of section 7(b) of Part II of the Fourth Schedule which provides for the function of provision of “trade licences (excluding regulation of professions)” to the county level of government.</p> <p>Therefore, it provides for functions that are a preserve of the national level of government and therefore, adheres to the provisions of</p> <p>Article 186(1) of the Constitution as read with Part I and II of the Fourth Schedule to the Constitution.</p>	N/A
Branding of Stock Act (Cap. 357)	The Act violates the <u>institutional integrity</u> of the county level of government.	The Act concerns itself with both the function of “veterinary policy” of the national government as provided for under section 30 of Part I of the Fourth Schedule as well as the “agriculture” function of county government under section 1 of Part II of the Fourth Schedule. The Act contravenes the provisions of the Constitution by	The Act should be amended so that it refers to county governments as opposed to the now-defunct local governments and in effect recognizing the institutional integrity of the county level of government.

Table 12: Matrix Audit of Agriculture Sector Laws (Cont'd)

Act/Policy	Issues	Rationale	Recommendations
		not recognizing the existence of the county level of government.	
Bukura Agricultural College Act (No. 5 of 1999)	The Act does not offend Article 6(2), Article 186 as well as the Fourth Schedule of the Constitution.	<p>The Act does not offend Article 6(2), Article 186 as well as the Fourth Schedule of the Constitution. This is because it is an Act of Parliament that sets up a special college for the training of persons specialized in matters relating to agriculture and any other connected purposes.</p> <p>Section 16 of Part I of the Fourth Schedule provides that that the functions of “Universities, tertiary educational institutions and other institutions of research and higher learning and primary schools , special education, secondary schools and special education institutions” is a function of the national government. Since the Act establishes a special education institutions for matters relating to agriculture, it is in not in any direct conflict with the functions of the national or county levels of governments as listed under Part II of the Fourth Schedule.</p>	N/A
Cattle Cleansing (Cap. 358)	The Act does not adhere to constitutional provisions on the functions of the national and county level of government. It also does not recognize the institutional integrity of the county level of government.	<p>Section 4 of the Act provides for the establishment of the Provincial Agricultural Board. Such a board has no functional or institutional relevance in light of Article 6(2) of the Constitution which recognizes that Kenya is divided into two level of government that is, the national and the 47 county governments.</p> <p>Also, the Act concerns itself with the cleansing of animals infected with parasites such as ticks and other animal disease causing parasites. Under Section 1 of Part II of the Fourth Schedule, the function of “Agriculture” as</p>	<ol style="list-style-type: none"> a. The Act should be amended to reflect the existence of the county level of government as opposed to the now-defunct local government that it recognizes in its provisions. b. The Act should be amended to reflect the fact that plant and animal disease control is a function of the county level of government.

Act/Policy	Issues	Rationale	Recommendations
		apportioned to the county level of government includes “plant and animal disease control”. The failure of the Act to recognize both the functional and institutional integrity of the county level makes it unconstitutional.	
Dairy Industry Act (Cap. 336)	The Act violates the institutional integrity of the county level of government.	<p>The Act established a Board whose functions generally relate to the function of the national government called “National economic policy and planning” provided for under section 9 of Part I of the Fourth Schedule. The Act seeks to increase the production of the dairy industry through encouraging privatization and by increasing overall efficiency in production. These are goals geared towards the enhancement of the dairy industry in general as a sector of the economy.</p> <p>However, considering that Article 6(2) of the Constitution provides for two levels of government, paragraph (f) of section 17 of the Dairy Industry Act should be amended to reflect that agriculture is a county governments’ function and incorporate county governments as opposed to the now defunct “local authorities”.</p>	<p>Section 5 of the Act provides for the membership of the Board. Considering that agriculture is a county government, the section should be amended so that the membership of Board incorporates representation from the county level of government.</p> <p>This will reflect and respect the institutional integrity of the county level of government.</p>
Ewaso Ng’iro North River Basin Development Authority Act (Cap. 448), Kerio Valley Development Authority (KVDA) Act, Cap 441 Lake Basin Development Authority (LBDA) Act, Cap 442, Tana River and Athi River Development	The Acts violate both the functional and institutional integrity of the county level of government.	The Regional Development Authorities violate the functional and institutional integrity of the county level of government since they perform functions that are a preserve of the county level of government such as functions relating to agriculture.	<ol style="list-style-type: none"> These Acts of Parliament can be amended so that their role is limited to capacity building. Since regional development authorities have wider mandate that runs through several counties, they can play a role in capacity building for the county governments in tandem with section 32 of Part I of the Fourth Schedule and assist and support county governments by co-ordinating

Table 12: Matrix Audit of Agriculture Sector Laws (Cont'd)

Act/Policy	Issues	Rationale	Recommendations
<p>Authority (TARDA) Act, Cap 443,</p> <p>Ewaso Ngiro South River Basin Development Authority (ENSDA) Act, Cap 447</p> <p>Ewaso Ngiro North River Basin Development Authority (ENNDA) Act, Cap 448</p> <p>The Coast Development Authority (CDA) Act, Cap 449</p>			<p>policies as well as projects in the counties they operate in as provided for under Article 189(1) (b) and (c) of the Constitution.</p>
<p>Fertilizers And Animal Foodstuffs Act (Cap. 345)</p>	<p>The Act does not violate the functional and institutional integrity of the county level of government.</p>	<p>The Act respects and recognizes the functional and institutional integrity of the county level of government. The Board established by the Act, whose membership includes a person nominated by the Council of County Governors, concerns itself with matters that are a preserve of the national government as provided for under Part I of the Fourth Schedule such as importation of goods into the country. It also concerns itself with agriculture which is a function of the county level of government but its role is only limited to advising the county government in matters relating to policy. As such, the Act does not violate Article 6(2), Article 186 of the Constitution as well as the Fourth Schedule of the Constitution.</p>	N/A
<p>Fisheries Management And Development Act (No. 35 Of 2016)</p>	<p>The Act violates the functional integrity of the county level of government.</p>	<p>The Act is oriented towards the role of the national government in negligence of the county governments in fisheries development. Section 6(2) (b) relates to the allocation and access to fisheries resources which has a bearing on the exercise of the</p>	<p>Section 7(1) (n), (o) and (p) should be deleted as the functions they provide for are functions of the county level of government.</p>

Act/Policy	Issues	Rationale	Recommendations
		<p>county level of government in its exercise of the function of agriculture but the section does not provide for the role of the Council in as far as county governments are concerned.</p> <p>The functions of the Fisheries Council under Section 7(1) (n), (o) and (p) encroach on the county level of government's function because the national government's function in relation to fisheries is limited to the protection of the environment which includes the sustainable utilization of fishery resources.</p>	
<p>Hide, Skin And Leather Trade Act (Cap 359)</p>	<p>The Act violates the functional integrity of the county level of government and thus unconstitutional.</p>	<p>The hide, skin and leather industry is a core part of the "Agriculture" function because it relates directly with the element of "animal husbandry" which is part of the "agriculture" function of the county level of government. The production of hides, skins and processing of leather are part and parcel of "animal husbandry" within the context of section 1 of Part II of the Fourth Schedule.</p> <p>The Act does not recognize this function of the county level of government as it does not provide for the role of the county level of government in matters relating to hides and skins as contemplated in section 1 of Part II of the Fourth Schedule. It only concerns itself with the "export" and "import" of hides, skins and leather in total disregard of the role of county government in "agriculture"</p>	<p>The Act should be amended so as to recognize that the hide, skin and leather industry is an agriculture function under section 1 of Part II of the Fourth Schedule and the role that counties can play in the development of the industry in matters relating to export of products emanating from this industry.</p>
<p>The Irrigation Act (Cap. 347)</p>	<p>The Act does not recognize institutional integrity of county governments and therefore unconstitutional.</p>	<p>The Act recognised the place of the former local governments as custodians of trust lands (community land) as the Minister cannot compulsorily acquire such land for the purposes of a national irrigation scheme.</p> <p>However, the role of county governments in making those irrigation schemes effective is not recognized as the Act does not</p>	<p>Section 3 of the Act should be amended so that the county level of government is represented in the National Irrigation Council.</p>

Table 12: Matrix Audit of Agriculture Sector Laws (Cont'd)

Act/Policy	Issues	Rationale	Recommendations
		recognize county governments. This is seen in section 3 as read with the Schedule which do not recognize the county level of government in the composition of the National Irrigation Board.	
Kenya Meat Commission Act (Cap. 363)	The Act does not recognize the functional integrity of the county level of government.	<p>The functions of the Kenya Meat Commission, as listed in the short title and under section 9 of the Kenya Meat Commission Act are similar to those provided to the county level of government under the Fourth Schedule of the Constitution. These include the function of “animal husbandry” and the construction of “abattoirs” which are part and parcel of the agriculture function.</p> <p>The Act fails to recognize county governments despite the fact that some of the functions that the Commission carries out are functions under “agriculture” as apportioned to the county level of government under Part II of the Fourth Schedule.</p>	<p>a. The Act should be amended to recognize the county level of government and its role in animal husbandry including the construction of abattoirs.</p> <p>b. Section 9 of the Act should be amended so that the functions listed therein are limited to capacity building where the functions clash with those of the county level of government under section 1 of Part II of the Fourth Schedule.</p>
Kenya Plant Health Inspectorate Service Act (No. 54 Of 2012)	The Act does not offend the functional and institutional integrity of the county level of government	A casual reading of the functions of the Kenya Plant Health Inspectorate Service shows that the functions are related to the function of “agricultural policy”, international trade and foreign affairs which are functions of the national government. The functions of the service do not concern themselves with matters relating to crop husbandry.	
Meat Control Act (Cap. 356)	The Act does not impeach the functional and institutional integrity of the county level of government in matters relating to agriculture	It can be deduced that the Act, as much as it concerns itself with slaughterhouses (a function of the county level of government under “agriculture”), it is intended to enhance health policy in the manner in which meat meant for human consumption is handled in slaughterhouses and other places where such meat is to be processed.	N/A

Act/Policy	Issues	Rationale	Recommendations
		<p>This are elements of health policy under section 28 of Part I of the Fourth Schedule. Also, it concerns itself with how meat is imported or exported. This is a matter concerning international trade and which is a function of the national government under section 1 of Part I of the Fourth Schedule.</p>	
<p>National Cereals And Produce Board Act (Cap. 338)</p>	<p>The Act violates the functional and institutional integrity of county governments as it does not recognize the “agriculture” function of county governments relating to “crop husbandry”.</p>	<p>The functions of the National Cereals and Produce Board fall within what is referred to as “crop husbandry” under section 1 of Part II of the Fourth Schedule. This is because the functions involve the production of maize, wheat and other scheduled crops, the processing and collection of these crops which fall within the definition of crop husbandry.</p> <p>However, considering that these functions fall within the meaning of section 1 of Part II of the Fourth Schedule, the Act does not recognize the role of the county level of government as seen from the composition of the Board under section 3(2) of the Act.</p>	<ol style="list-style-type: none"> a. Section 3 of the Act should be amended to recognize the county level of government. b. Where the functions of the National Cereals and Produce Board clash with those of the county level of government in as far as crop husbandry is concerned, the Act should be amended so that NCPB plays a capacity building role.
<p>Pest Control Products Act (Cap. 346)</p>	<p>The Act violates the functional integrity of the county level of government.</p>	<p>Section 1 of Part II of the Fourth Schedule provides for “plant and animal disease control” as part and parcel of the “agriculture” function of county government. Therefore, pest control is a part and parcel of plant and animal disease control function.</p> <p>However, the Act does not recognize this function of the county level of government. This is because it does not provide for any section that acknowledges the disease control aspect of section 1 of Part II of the Fourth Schedule of the Constitution.</p>	<p>The Act should be amended in its entirety to recognize that the function relating to plant and animal and disease control is a function of the county level of government.</p>

Table 12: Matrix Audit of Agriculture Sector Laws (Cont'd)

Act/Policy	Issues	Rationale	Recommendations
Plant Protection Act (Cap. 324)	This Act violates the functional integrity of the county level of government	<p>This Act of Parliament does not recognize that the function of “agriculture” and specifically, the function of “plant and animal disease control” is a function of the county level of government. It bestows on the Minister of Agriculture all powers in matters relating to the prevention and control of attacks by or the spread of pests or diseases.</p> <p>The Act also violates the function of “plant and animal disease control” as provided for under section 1 of Part II of the Fourth Schedule since this is a function of the county level of government.</p>	The Act should be amended to reflect that agriculture function of the county level of government in “plant and animal disease” control and limit the powers of the Ministry of Agriculture to capacity building and policy making.
Pyrethrum Act (No. 22 of 2013)	The Act does not violate the functional and institutional integrity of the agriculture function of the county level of government.	The functions of Pyrethrum Regulatory Authority listed in section 4 of the Act are regulatory in nature and relate to the setting up of standards that must adhered to in the pyrethrum industry. These fall within the context of “agricultural policy” (a function of the national level of government) as provided for under section 29 of Part I of the Fourth Schedule. Therefore, as far as the Act is concerned to the regulation of standards in the pyrethrum sector, the Act does not violate the functional and institutional integrity of the county level of government.	N/A
Seeds And Plant Varieties Act (Cap. 326)	The Act does not violate the functional and institutional integrity of the county level of government on agriculture.	The Act does not violate the functional and institutional integrity of the county level of government because it concerns itself with intellectual property matters relating to seeds and plant varieties; function of the national level of government.	N/A
The Crops Act of 2013	The Act violates the functional integrity of the county level of government.	The wording of the Act shows that it gives a greater leverage to the national government at the expense of the county level of government. Part I of the Fourth Schedule is clear as to the function of the national government is in as far as matters concerning	In order to recognize the functional integrity of the county level of government, section 6 of the Act must be amended to reflect the fact that “agriculture” is a function of the county level of government and any

Act/Policy	Issues	Rationale	Recommendations
		<p>agriculture are concerned.</p> <p>The function of the national government is limited to the setting up agricultural policy. The Act recognizes that but goes ahead and provides that the national government shall be responsible for the licensing and charging of levies and breeder royalties on all scheduled crops.</p>	charges and levies not related to income tax, import duty, excise duty and value added tax are imposed on the crops by the county level of government
The Kenya Agricultural And Livestock Research Act of 2013	The Act does not offend the institutional and functional integrity of the county level of government in as far matters relating to the function of “agriculture” is concerned.	The Act concerns itself with research on matters relating to agriculture and livestock research. These are function of the national government as provided for under section 16 of Part I of the Fourth Schedule which apportions the function of “Universities, tertiary educational institutions and other institutions of research and higher learning and primary schools, special education, secondary schools and special education institutions” on the national level of government. The organisation falls within the ambit of what is referred to as “other institutions of research” under section 16.	N/A

4.3 Agricultural Policies

In terms of policy documents for the agricultural sector two have been the most critical in steering the sector. These are, the Strategy for Revitalizing Agriculture (SRA, 2004-2014) and the Agriculture Sector Development Strategy (ASDS, 2010-2020). The latter was developed from the viewpoint of revising the earlier document in order to harmonize and bring it to conformity with the Constitution, 2010. The other significant change of the revised development strategy is the paradigm shift of focusing on food security and prosperity from subsistence farming to agriculture as business.

The **Agriculture Sector Development Strategy** forms the overall national strategy document for agricultural sector ministries and other stakeholders.

The Strategy addresses interventions in Agriculture, Livestock, Fisheries, Cooperatives, Water, Environment, Agroforestry and Private Sector.

In the last 5 years, the sector has been revitalized and placed on the path for further development. Hence, this strategy is perceived as an Agriculture Sector Development Strategy (ASDS). Although much has been achieved during the period, the challenges of food security, poverty reduction and transforming agriculture from subsistence to farming as a business—agribusiness, markets, efficient use of inputs and agricultural credit—still remain. The ASDS seeks to progressively reduce unemployment and poverty, and to spur agriculture back to growth trends.

The vision of the ASDS is: A food-secure and prosperous nation. Since the agricultural sector is still the backbone of Kenya's economy—and the means of livelihood for most of the rural population—it is inevitably the key to food security and poverty reduction. The overall goal of the agricultural sector is to achieve an average growth rate of 7 per cent per year over the next 5 years. Given the critical strategic issues that need to be addressed, the strategic mission for the sector is: An innovative, commercially oriented and modern agriculture.

The overall development and growth of the sector is anchored in two strategic thrusts:

- » Increasing productivity, commercialization and competitiveness of agricultural commodities and enterprises
- » Developing and managing key factors of production.

The strategy adopted the strategic thrust of increasing the productivity, commercialization and competitiveness of agricultural commodities as core factors to enable the sector to export more outputs, earn the country foreign exchange, and create employment. With the responsibilities of the agricultural sector spread across 10 ministries and the need for partnerships with several other ministries and stakeholders, implementation of ASDS required strong partnerships among the Government, private sector, development partners and other non-State actors. A sector-wide approach and strong coordination mechanisms was instrumental in the success of the strategy.

A strategy was needed to position the agricultural sector as the key driver for delivering the 10 per cent annual economic growth rate envisaged under the economic pillar of Vision 2030. The strategy would guide public and private sector efforts in addressing major development challenges facing the agricultural sector. In addition, the strategy has taken into account the ongoing institutional and policy reforms, the country's new political system and structure of government, the just-completed ERS and the SRA, and has incorporated agricultural policy proposals contained in Vision 2030's medium-term plan.

It has also taken into account regional and international initiatives such as the Comprehensive African Agricultural Development Programme (CAADP), which recognizes agriculture's contribution to accelerated economic growth in African countries, and the MDGs in which the United Nations member countries pledged to reduce extreme hunger and poverty by 2015. In developing this strategy, the Government perceived that the agricultural sector had been revived and was set on the path for further development, hence the Agricultural Sector Development Strategy. The overriding goal of the ASDS was to achieve a progressive reduction in unemployment and poverty, and the two major challenges of poverty and food security that Kenya continues to face. The strategy outlines the agricultural policies, institutional reforms, and programmes and projects that the Government will implement in the short and long term to achieve this goal.

Within the context of devolved system of government, the strategy requires alignment as per the distribution of powers and functions between the two levels of governments. Notably, the strategy should overall cover the thrust and strategic direction of the sector but exercise caution with regard to allocation powers of implementation. The dichotomy of distribution of powers and function should observe and allocate responsibility to the national government that relate to the nation policy in relation to the following;

- » Agricultural policy,
- » Support to agricultural research and promote technology delivery,
- » Regulation and quality control of inputs, produce and products from the agricultural sector,
- » Management of control of pests and disease in crops,

- » Promote management and conservation of the natural resource base for agriculture, and
- » Promotion of market access and product development

As per the distribution of functions between the two levels of government in fourth schedule, the strategy needs revision to provide for the wider scope of policy implementation to county governments. This revision will cover the following areas;

- » Implementation of policy and legal frameworks
- » Improving agribusiness and market Access
- » Improving land use and crop Development
- » Enhancing access to Inputs and credit to farmers
- » Improving livestock productivity
- » Improving control of livestock diseases and Pests
- » Integrated development and management of rangelands
- » Improving animal health
- » Developing aquaculture
- » Improving capacity for marketing agricultural inputs and produce
- » Enhancing access to agricultural credit
- » Promoting and implementing value addition
- » Promoting good governance, management and efficiency
- » Implementing programs for private sector participation

Implementation of the ASDS was coordinated the Agricultural Sector Coordination Unit (ASCU) which, organized the sector's biennial national forum of stakeholders. The forum discussed implementation constraints, progress and ways of overcoming them and considerations of future prospects. At the middle level, the inter-ministerial coordination committee included all ministries that provide services to the agricultural sector. The committee comprised of principal secretaries of the lead and collaborating ministries and were responsible for coordinating the planning of the strategy at the sector level and monitoring its implementation to ensure that its goals were achieved. At the Local level, ASDS was implemented through district agricultural development committees (DADCs) made up of the sector ministries and stakeholders.

This requires a significant shift since the largest aspect of the strategy's implementation relates to service deliver which now is the responsibilities of the county governments. (The review of the strategy is ongoing and succinct proposal in relation to implementation framework have been forwarded).

The National Livestock Policy (sessional paper no 2 of 2008) addresses the challenges in the livestock sub-sector in the context of livestock breeding, nutrition and feeding, disease control, value addition and marketing, and research and extension. The policy is broadly guided by the following specific objectives and is designed to:

- » Achieve appropriate livestock management systems for sustainable development of the livestock industry;
- » Improve and conserve available animal genetic resources effectively;
- » Achieve effective control of animal diseases and pests in line with the relevant international codes and standards;
- » Ensure safety of foods of animal origin through professional meat inspection, milk hygiene, and other animal resource products quality control;

- » Focus research efforts in the livestock sub-sector on resolving current and emerging problems;
- » Ensure quality standards and quality assurance at all levels of production and marketing chain for increased competitiveness of the livestock industry; and
- » Address various cross-cutting issues that impact on the livestock sub-sector; among such issues are land, water, environment, infrastructure, insecurity, livestock-wildlife interactions, HIV/AIDS and other human diseases, gender and capacity building.

The sessional paper at the time of its development, 2008 assumed an institutional and implementation framework of a centralized system of government. For realignment to the devolved system of government, focus of implementation of the policy programs will require to be assigned to county governments in the following functional areas;

- » Implementation of national veterinary policies including formulation of relevant county policies
- » Management of livestock sale yards and county abattoirs
- » Livestock extension services to deliver husbandry technologies
- » Management of sanitary measures; management of county abattoirs, primary preventive health care –vaccination, veterinary Clinical services, implement disease control programmes and disease surveillance
- » Vector surveillance and control including tick and tsetse fly control
- » Management of regulatory services such as control of animal movement (intra and inter county) and development of relevant county veterinary laws
- » Implement international treaties for animal resource industry
- » Implement international standards on animal health, production and food safety
- » Implementation of animal welfare standards across all species and sectors- transportation, humane slaughter
- » Conservation and management of animal reproductive resources such as Implementation of animal reproductive services including Artificial insemination
- » Collection and synthesis for county planning and reporting to National Veterinary Services
- » Development of county specific programmes and projects
- » Promotion of livestock trade- market access and product development

The Co-operative Development Policy revised policy is up to date with regards to functional assignment with a clear distribution of function between the two levels of governments. The role of county governments has been articulated as the management and administration of Co-operatives as follows:

- » Formulate county specific co-operative policies in line with national goals and policies;
- » Promote registration of co-operatives;
- » Carry out impromptu inspections into the affairs of county co-operatives;
- » Provision of audit services and enforcement of audit requirements and standards;
- » Promote value addition and adoption of appropriate technology by co-operatives;
- » Establish and maintain county co-operative information centres;
- » Enforce compliance with co-operative legislation;
- » Facilitate collaboration and linkages with various stakeholders for the benefit of the movement;

- » Enforce good governance in the management of the co-operative societies within their jurisdiction; and
- » Undertake co-operative education and training.

The National Food and Nutrition Security Policy (Sessional Paper No. 1 of 2012) seek to achieve good nutrition for optimum health of all Kenyans. The broad objectives of the policy are:

- » To achieve adequate nutrition for optimum health of all Kenyans;
- » To increase the quantity and quality of food available, accessible and affordable to all Kenyans at all times; and
- » To protect vulnerable populations using innovative and cost-effective safety nets linked to long-term development.

The FNSP addresses associated issues of chronic, poverty-based food insecurity and malnutrition, as well as the perpetuity of acute food insecurity and malnutrition associated with frequent and recurring emergencies, and the critical linkages thereof. These main issues of concern that the policy addresses include; food availability and access, food safety, standards and quality control, nutrition improvement, school nutrition and nutrition awareness, food security and nutrition information, and early warning and emergency management.

The policy proposed a well-streamlined food and nutrition security implementation strategy through the creation of secretariats at national and county levels. These are to bring together all relevant ministries to ensure broad, multi-sectoral implementation, coordination and monitoring mechanisms, providing a forum for an integrated response to both emergency and chronic food and nutrition security issues. More so this will serve as advisory bodies to the respective level of government on issues relating to food and nutrition security.

The National Agricultural Sector Extension Policy (NASEP) (Sessional Paper No 1 of 2011) seeks to promote pluralistic extension service provision as well as guide the operations of Extension Services Providers (ESPs) through an established independent regulatory body to ensure quality. The policy sets a framework to provide strategic guidelines on:

- » Commercializing and privatizing extension services;
- » Regulation, coordination, monitoring and evaluation of extension services;
- » Approaches and methods of extension services delivery;
- » Content and choice of extension messages by ESPs and their clientele;
- » Empowering clientele;
- » Stakeholder collaboration and networking;
- » Modalities for funding of extension services including the formation and operations of the stakeholder trust fund; and
- » Institutional framework and linkages

The policy sets out an implementation plan that is largely coordinated by the Agricultural Sector Coordination Unit (ASCU). It is envisioned that; the Unit would spearhead the preparation of the National Agriculture Sector Extension Policy Implementation Framework. Extension services are fully devolved are the mandate of county government and therefore from an implementation standpoint, these set of activities should be carried out by respective county governments and not the ASCU. The services provided at the county level are primarily extension services

Another policy, the **Agricultural Research System Policy 2012** aims to reform the Kenyan agricultural research system into a dynamic, innovative, responsive and well-coordinated system driven by a common vision and goal. The policy objectives are: improving agricultural research policy framework; harmonizing and providing direction to national research for sustainable

development; strengthening the legal, institutional and regulatory framework; coordinated planning, development and sharing of human resources and physical assets; coordinated planning, development and management of knowledge, information and communication technology; increased focus on outreach and technology dissemination and targeted partnership development framework.

- » What's needed is coordination with county governments - develop a framework for strong working relations with the county governments in implementation of agricultural research – farming practices
- » Agricultural technology development and application
- » Increased focus on outreach and technology dissemination – coordination with county government (application)
- » KALRO - Board appointment – in the law) representation of county governments in the
- » Research agenda – needs to be aligned with the needs of the county governments alongside areas of crop and animal husbandry

The National Agribusiness Strategy focuses on putting markets at the centre of all production, processing, product development and packaging as well as focus research and development and innovation to better catalyse growth of a vibrant agribusiness sector.

- » The aspect of development of market systems to enhance productivity, processing, product development across agricultural value chains is a mandate of county governments.
- » County governments would need to develop and finance the different programs and strategies on market system development with a very limited role of the national government on standards and norms.

The National Horticulture Policy 2012 outlines the government's intended measures in the development and expansion of the horticulture industry. The objective of the policy is to sustain the industry's growth and development to enable it to; contribute to food and nutrition security, provide raw materials for primary processing, compete favourably in the export market and earn more foreign exchange, generate increased incomes and employment for various players, and generally contribute to the broader economic goals as envisaged in Vision 2030.

This policy offers specific interventions for production, support services (financing, research and extension), marketing (local, regional and export markets), infrastructure as well as regulatory and institutional arrangements. Cross-cutting issues affecting the industry are also analysed and policy interventions proposed.

Notable the elements of production, support services, marketing and infrastructure development is the mandate of county government. The policy requires revision to align distribution of functions between the two levels of governments. The aspect of the development of the regulatory regime is the mandate of the national government though the enforcement is executed by the county governments, which calls for a better designed policy to enhance coherence in implementation.

The National Seed Policy 2010 outlines the intervention measures to be implemented in the seed sub-sector for purposes of providing standards and uniform variety testing procedures. The policy also provides for the regulations needed for varietal release and listing of seeds in relation to

- » Provide procedures for seed production;
- » Comprehensive and flexible certification guidelines;
- » Relevant and simpler seed export and import requirements;

- » Outline the roles of relevant stakeholders in the coordination, structure, functioning and development of the seed sector;
- » Serves as the overall framework for regulatory instruments, such as the seed law and related legislation; and
- » Ensures a workable and efficient regulatory regime to operations within the seed sector.

Good balance between objectives on mandate for policy and regulation for national government whilst the county the county governments focus on he to enforcement of nationally agreed standards and uniformity of variety

Revision of the policy should be undertaken immediately and critically to consider and clearly outline the responsibility of County governments with respect to enforcing the standards and uniform variety testing procedures for seeds.

The National Dairy Policy aims at improving the productivity and competitiveness of the dairy industry in Kenya for improved livelihoods and food security. The goal of this policy is to improve the livelihoods of Kenyan dairy industry sector actors in line with the vision 2030. The policy thrust is to translate the sub-sector into increased dairy sector productivity leading to national food security, increased incomes and economic growth. The specific objectives of this policy are to: -

- » Improve the productivity and competitiveness of Kenya's dairy and dairy Products;
- » Positively contribute to the livelihoods of milk producing households;
- » Increase domestic consumption of milk and milk products;
- » Contribute to national food security;
- » Transform the industry into an exporter of dairy animals and products;
- » Maximize dairy exports in the regional and global markets; and
- » Re-orient milk processing towards long life dairy products.

Production and improving productivity is services provision, which is the mandate of county government and primarily relates to extension services.

The policy requires a reorientation to comply with the functional assignment. Objectives and programs on improving the productivity and competitiveness of the dairy industry need to be articulated in county policy frameworks – for purposes of translating them into projects and allocation of adequate financial resources.

The National Poultry Policy (Sessional Paper No. 2 of 2010) focuses on enhancing the contribution of the poultry industry towards food security and employment creation in the country. The main objective of the policy is to enhance the contribution of the poultry industry towards food security and employment creation in the country, specific by: -

- » Enhancing poultry production and productivity;
- » Facilitating timely detection, diagnosis, treatment and control of poultry diseases;
- » Promoting competitiveness of the poultry industry locally, regionally and internationally; and
- » Promoting value addition and marketing of poultry and poultry products.

The thrust of the policy focuses mostly on production, competitiveness and value chain development, which are all elements of county governments. The policy requires to be reviewed in line with the distribution of functions between the two levels of government with only allocation of matters national policy to the national government.

Production and improving productivity and value chain development are aspects of services provision, which is the mandate of county government and primarily relates to extension services.

The policy requires a reorientation to comply with the functional assignment.

Objectives and programs on improving the productivity, competitiveness, value chain development (value addition) of the dairy industry needs to be articulated in county policy frameworks – for purposes of translating them into projects and allocation of adequate financial resources.

The National Bee Keeping policy aims at enhancing the contribution of the beekeeping sector to food security, employment creation and environmental conservation in the country. The specific objectives of the policy are:

- » To increase the production and supply of honey and other hive products to meet local demand and have surplus for export;
- » To promote value addition at all stages of beekeeping value chain and improve marketing of hive products for an internationally competitive market;
- » To ensure existence and safety of honeybees; To assure quality of hive products; and
- » To promote environmental conservation

The policy needs to be reviewed to recognize the functional areas that are the mandate of county governments. The policy must acknowledge and outline policy measures, which require implementation of the policy program by the county governments in order to achieve the overall policy objectives. Beside the element of policy matters, the entire thrust of the policy is the mandate of county governments.

The National Rice Development Strategy is to improve food security and income of Kenyans through sustainable rice production, marketing and utilization. The strategic Objectives are: expansion of area under rain-fed and irrigated rice; Reduction in field and storage losses of rice; Improved farmer's access to credit and to high quality inputs; Improved farmers' access to certified rice seed; Provision of advisory extension support services; Provision of effective monitoring and evaluation (M&E) system; Strengthened human resource development.

Revision of the policy/strategy to bring compliance with distribution of functions and powers – production, access to credit and to inputs, provision of extension services etc.

Strategic Interventions – revision because their implementation is the aspect of county governments

- » Rice productivity increased by developing: -
- » Improving and expanding irrigation infrastructure
- » Field and post-harvest losses reduction
- » Farmers access credit and high-quality inputs by
- » Facilitating adequate production, distribution and marketing of good quality seeds.
- » Extension, advisory support services and technology development and application

The National Policy on Integration and Drainage Development provides for the institutional set up and composition of the National Irrigation Board – representation of county governments. The parent law, the Irrigation Act does not provide for the involvement of county governments. However, irrigation projects may be performed on lands under the control of county governments. Therefore, the policy should be revised to ensure coordination and collaboration with county governments.

The Kenya Veterinary Policy, 2015, governs the livestock sub-sector. The provisions of the Fourth Schedule of the Constitution of Kenya guide the development of the policy. It aligns developments in the animal resource industry to the Constitution as well as the Kenya Vision 2030 and the international animal health laws, treaties, agreements and conventions ratified by Kenya. Development and growth of the animal resource industry has hitherto relied on the National Livestock Policy, the Agricultural Sector Development Strategy, the Kenya Vision 2030 and commodity or issue-specific policies among others. However, animal resources by their nature are varied and their functions straddle different institutions and departments. Livestock, fisheries and wildlife constitute the three broad functional domains managed by different institutions; aspects of human, animal and environmental health require cooperation across departments. The Veterinary Policy creates operational linkages among these institutions while recognizing and preserving their functional specialties. The Policy specifies key challenges facing the animal resource industry and provides direction in addressing each of them. It focuses on ten objectives leading to the realization of the goals in the animal resource industry.

The Policy takes into account the constitutional obligations of each level of government, national and county, with regard to development of animal resources and outlines functional relationships between the two levels of government. The Policy provides an enabling environment for safeguarding animal life, health and welfare as well as animal propagation and production for food security and economic development. The design of the policy is hoped to largely inspire implementation, which will boost the contribution of the animal component to food security and ensure that animal products that are consumed or marketed meet the highest safety and nutritional standards.

The development and governance of the fisheries sub-sector in Kenyan has generally and largely focused on the inland sector. The governance of marine sector is weak and may require strengthening in terms of policy and structural reform. The policy frame on fisheries provides for the conservation, management and development of fisheries and other aquatic resources focusing on ways to enhance the livelihood of communities that depend on fishing.

The overarching policy is the **National Oceans and Fisheries Policy, 2008**, which outlines the policy guidelines and objectives for the sector and enumerates guiding principles for the policy. It also gives specific policy statements covering the areas of research and development for the fisheries sector, proposal on resource management, prioritization of matters on aquaculture development and the enhancement of monitoring control and surveillance.

Further, the policy provides for the legal and institutional framework and details out opportunities for trade and commerce, infrastructure investments and infrastructure development together with the aspects of human resource development. This policy is outdated with regard to the governance of the country and specifically the system of devolved government by the dint of being developed in 2008. In as much the policy development was comprehensive at the time and taking cognizance national development plans, the Strategy for Revitalizing Agriculture (SRA) of 2004 and the Kenya Vision 2030 much has changed that require realignment of the policy document.

Table 13: Matrix Audit of the Agriculture Sector Policies

Act/Policy	Issue	Rationale	Recommendation
Agricultural Sector Development Strategy (ASDS)	<p>As per the distribution of functions between the two levels of government in fourth schedule, the strategy frames functions for devolved to county governments as though they are within the purview of the national government. The issues under consideration includes:</p> <ul style="list-style-type: none"> ▪ Implementation of policy and legal frameworks ▪ Improving agribusiness and market Access ▪ Improving land use and crop Development ▪ Enhancing access to Inputs and credit to farmers ▪ Improving livestock productivity ▪ Improving control of livestock diseases and Pests ▪ Integrated development and management of rangelands ▪ Improving animal health ▪ Developing aquaculture ▪ Improving capacity for marketing agricultural inputs and produce ▪ Enhancing access to agricultural credit ▪ Promoting and implementing value addition ▪ Promoting good governance, management and efficiency ▪ Implementing programs for private sector participation 	<p>The policy the way it is currently designed and framed portends a perspective whereby policy implementation is skewed in a manner entails national government functions performing and undertaking functions allocated to the county government as per the constitution. This requires a significant shift since the largest aspect of the strategy's implementation relates to service deliver which now is the responsibilities of the county governments</p>	<p>Revision of the policy with a view to developing an entirely new policy. Notable the national government through the Ministry of Agriculture has initiated this process</p>
Session Paper no 2 of 2008 on National Livestock Policy	<p>Aspects of powers and functions under livestock functional areas that have been devolved to county governments are framed by the policy as belong to the national government.</p>	<p>The sessional paper at the time of its development, 2008 assumed an institutional and implementation framework of a centralized system of government.</p>	<p>An overhaul of the sessional paper and be framed to embrace the spirit of the constitution in relation to functional assignment and also</p>

Act/Policy	Issue	Rationale	Recommendation
		<p>For realignment to the devolved system of government, focus of implementation of the policy programs will require to be assigned to county governments in the following functional areas:-</p> <ul style="list-style-type: none"> implementation of national veterinary policies; management of livestock sale yards and county abattoirs; livestock extension services to deliver husbandry technologies; management of sanitary measures; management of county abattoirs, primary preventive health care – vaccination, veterinary Clinical services, implement disease control programmes and disease surveillance; vector surveillance and control including tick and tsetse fly control; management of regulatory services such as control of animal movement (intra and inter county) and development of relevant county veterinary; implementation of animal welfare standards across all species and sectors- transportation, humane slaughter; conservation and management of animal reproductive resources such as Implementation of animal reproductive services including Artificial insemination; collection and synthesis for county planning and reporting to National Veterinary Services; promotion of livestock trade- market access and product development. 	<p>provide a framework to support implementation of devolved functions in the livestock sector.</p>
<p>The Co-operative Development Policy</p>			<p>The revised policy is up to date with regards to functional assignment with a clear distribution of</p>

Table 13: Matrix Audit of the Agriculture Sector Policies (Cont'd)

Act/Policy	Issue	Rationale	Recommendation
			<p>function between the two levels of governments. The role of county governments has been articulated as the management and administration of Co-operatives as follows:- formulate county specific co-operative policies in line with national goals and policies; promote registration of co-operatives; carry out impromptu inspections into the affairs of county co-operatives; provision of audit services and enforcement of audit requirements and standards; promote value addition and adoption of appropriate technology by co-operatives; establish and maintain county co-operative information centers; enforce compliance with co-operative legislation; facilitate collaboration and linkages with various stakeholders for the benefit of the movement; enforce good governance in the management of the co-operative societies within their jurisdiction; and undertake co-operative education and training.</p>
<p>National Food and Nutrition Security Policy: Sessional Paper No.1 of 2012</p>	<ul style="list-style-type: none"> • These main issues of concern that the policy addresses include; food availability and access, food safety, standards and quality control, 	<ul style="list-style-type: none"> • Aspect of food availability, food safety and nutrition improvement is within the purview of county government for reasons 	<p>Review of the policy can be undertaken in the medium term under the mechanism of relevant sectoral forum</p>

Act/Policy	Issue	Rationale	Recommendation
	<p>nutrition improvement, school nutrition and nutrition awareness, food security and nutrition information, and early warning and emergency management.</p> <ul style="list-style-type: none"> The policy proposed implementation strategy through the creation of secretariats at national and county levels. 	<p>of subsidiarity and proximity of enforcement.</p> <ul style="list-style-type: none"> Implementation of the policy programs as per the proposed structures requires adjustments and revision to enhance coordination especially matters on enforcement of standards and advocacy programs including awareness rising. 	
National Agricultural Sector Extension Policy Sessional Paper no 1 of 2011	<p>Agricultural extension services are fully devolved are the mandate of county government and therefore from an implementation standpoint, respective county governments and not the ASCU should carry out these set of activities.</p>	<p>Agricultural extension services both for crop and livestock are fully devolved and hence the policy should present a framework depicting that philosophy and viewpoint as well as an implementation framework by county governments</p>	<p>Revise the policy to bring to conformity of the distribution of powers and function under the functional area of agriculture and specifics of agricultural extension services.</p>
National Agricultural Research System Policy, 2012	<ul style="list-style-type: none"> Lack of coordination with county governments in the development of agricultural research – farming practices Agricultural technology development and its application Poor coordination on outreach and technology dissemination in relation to application by county government Setting of the research agenda which requires to be aligned with the needs of the county governments alongside areas of crop and animal husbandry. 	<ul style="list-style-type: none"> Coordination between national and county governments in the develop a framework for coordination implementation of agricultural research farming practices Need for increased focus on outreach and technology dissemination – coordination with county government (application) 	<p>Extensive revision of the policy to reflect standards & norms for research development, application of research technology and coordination between the two levels.</p>
National Agribusiness Strategy	<p>The focus and priorities of the Agribusiness on production, processing, product development and packaging as well as focus research and development and innovation to better catalyse growth of a</p>	<ul style="list-style-type: none"> The aspect of development of market systems to enhance productivity, processing, product development across agricultural value chains is a mandate of county governments. 	<p>A complete overhaul of the policy and no need of a national strategy document on agribusiness. County should developed individual agribusiness strategy documents</p>

Table 13: Matrix Audit of the Agriculture Sector Policies (Cont'd)

Act/Policy	Issue	Rationale	Recommendation
	vibrant agribusiness sector which are all mandates of county governments in totality.	<ul style="list-style-type: none"> County governments would need to develop and finance the different programs and strategies on market system development with a very limited role of the national government on standards and norms. 	reelecting specific county contexts and needs
National Horticulture Policy, 2012	This policy offers specific interventions for production, support services (financing, research and extension), marketing (local, regional and export markets), infrastructure as well as regulatory and institutional arrangements. Cross-cutting issues affecting the industry are also analysed and policy interventions proposed.	The components of production, support services, marketing and infrastructure development are the mandate of county governments.	The policy requires revision to align distribution of functions between the two levels of governments. Critical is the aspect of the development of the regulatory regime is the mandate of the national government though the enforcement is executed by the county governments, which calls for a better designed policy to enhance coherence in implementation.
National Seed Policy, 2010	The thrust of the policy does not provide clarity for a system of devolved government where there is shared responsibility between the two levels of government. Lack clarity, policy coherence and allocation of responsibilities relate to the policy intervention measures in the setting out of standards and uniform variety testing procedures. The policy also provides for the regulations needed for varietal release and listing of seeds in relation to procedures for seed production; certification guidelines; seed export and import requirements; framework for regulatory instruments, such as the seed law and related legislation; and ensuring	Good balance between objectives on mandate for policy and regulation for national government whilst the county the county governments focus on the to enforcement of nationally agreed standards and uniformity of variety.	Revision of the policy should be undertaken immediately and critically to consider and clearly outline the responsibility of County governments with respect to enforcing the Standards and uniform variety testing procedures for seeds.

Act/Policy	Issue	Rationale	Recommendation
	there is a workable and efficient regulatory regime to operations within the seed sector.		
National Dairy Development Policy	The policy thrust is to translate the sub-sector into increased dairy sector productivity leading to national food security, increased incomes and economic growth. These all are functions of county governments: productivity and competitiveness of Kenya's dairy and dairy products; increasing of domestic consumption of milk and milk products; contribution of milk to the objectives of national food security; export of dairy animals and products etc.	Production and improving productivity is services provision, which is the mandate of county government and primarily relates to extension services.	The policy requires a reorientation to comply with the functional assignment. Objectives and programs on improving the productivity and competitiveness of the dairy industry need to be articulated in county policy frameworks – for purposes of translating them into projects and allocation of adequate financial resources.
Sessional Paper No. 2 of 2010 on National Poultry Policy	The thrust of the policy focuses mostly on production, competitiveness and value chain development, which are all elements of county governments. The policy requires to be reviewed in line with the distribution of functions between the two levels of government with only allocation of matters national policy to the national government.	Objectives and programs on improving the productivity, competitiveness, value chain development (value addition) of the dairy industry needs to be articulated in county policy frameworks – for purposes of translating them into projects and allocation of adequate financial resources.	The policy requires a reorientation to comply with the functional assignment.
National Beekeeping Policy	The policy goals and aims focus on enhancing the contribution of the beekeeping sector to food security, employment creation and environmental conservation in the country. Aspects production and supply of honey and other hive products to meet local demand and have surplus for export, promoting value addition and ensuring the existence and safety of honeybees fall well under	The policy must acknowledge and outline policy measures, which require implementation of the policy program by the county governments in order to achieve the overall policy objectives. Beside the element of policy matters, the entire thrust of the policy is the mandate of county governments.	The policy needs to be reviewed to recognize the functional areas that are the mandate of county governments.

Table 13: Matrix Audit of the Agriculture Sector Policies (Cont'd)

Act/Policy	Issue	Rationale	Recommendation
	the functions of county governments.		
Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy	<ul style="list-style-type: none"> • Protection of the environment and natural resources is allocated to national government whilst the county governments are in charge of implementation of specific national government policies on natural resources and environmental conservation. • The implementation framework that envisions the national government to prepare and implement Climate Change Action Plans • Mechanism for ensuring that the Climate Change Action Plans for implementation of the Policy are aligned with the regular MTPs of Vision 2030. • Public collaboration, consultations and public awareness being carried out by national government. 	<ul style="list-style-type: none"> • 6 specifically the ministerial and sectoral forums. 	The policy requires significant revision in order to align it to the devolved system of government alongside the abovementioned functional assignment of powers and functions under environmental conservation. Granted, the policy is well aligned to the constitutional objectives of the ecological commitment to ecologically for sustainable development.
National Biotechnology Development Policy	The policy's main statement of objective is to promote, and coordinate research in basic and applied sciences in biotechnology for purposes of promoting sustainable industrial development for the production of biotechnology-derived products. The application of biotechnology is largely in the areas of agriculture, public health and environment industries.	<ul style="list-style-type: none"> • The policy objective statements in terms of the agencies involved with production, regulation and application of biotechnology research and products need alignment to the devolved system of government. • The application of biotechnology is in functional areas (or sectors) that are devolved and hence the mandate of the county governments. It is however in order for the mandate on national 	Key consideration for the revision of the policy is to provide a framework of coordination and outlining enforcement mandate of regulation enforcement to county government.

Act/Policy	Issue	Rationale	Recommendation
		policy and regulation be allocated to the national government.	
The National Rice Development Strategy	Development strategy concerned with improving food security and income of Kenyans through sustainable rice production, marketing and utilization is not compliant with allocation of functions between the two levels of government more so agricultural production.	The strategic Interventions that relate to: rice productivity increase; improving and expanding irrigation infrastructure; field and post harvest losses reduction; farmers access credit and high quality inputs; facilitating adequate production, distribution and marketing of good quality seeds an extension, advisory support services and technology development and application are the mandate of county governments.	Immediate revision of the policy/strategy to bring it into compliance with distribution of functions and powers – production, access to credit and to inputs, provision of extension services etc. this is necessary since rice is s strategic grain for attaining food security.
National Policy on Irrigation and Drainage Development	The institutional set up and the implementation framework totally county governments role in irrigation and powers over land held in trust by county governments. The policy is framed in a manner which involves national government to be in active implementation of programmes and projects under irrigation within the jurisdictions of county governments.	<ul style="list-style-type: none"> • Representation of county governments if implementation of irrigation projects • Disregard by national government in acquisition of land, which is held in trust by county governments as custodians of trust lands. • Lack and poor coordination and collaboration by the two levels of governments. County Governments are left out and there is no collaboration. 	Revision of the policy in the medium term to reflect the allocation of functions between the two levels of government under irrigation. A better outline and description should be provided in the policy framework for areas of concurrent functions.

5

LAND AND PHYSICAL PLANNING

5.1 Introduction

Land is more than a factor of production in Kenya. Politics, economics and social life seem to revolve around land. The terms and conditions under which rights to land are acquired, retained, used, disposed or transmitted are a site of contest.³² Kenya as a nation state and counties are defined on the basis of territory, which is equivalent to land. Land hosts many renewable and non-renewable resources upon which both the citizenry at the local level and the running of the nation and county depend. Land rights are coterminous with rights to resources at the individual, local, county and national levels.

Land is one area where the functions of the National and County governments inexorably converge. The devolved system of government has been in operation for close to five years. This has been a time of refining institutions and laws to ensure that the intended purposes of devolution are met. Not surprisingly, conflicts have arisen as the process of devolution has unfolded with the national and county governments finding their spaces and seeking to coordinate with and respect the functional and institutional integrity of government at the other level.

Article 60 of the Constitution outlines the national land policy principles. It states that land in Kenya 'shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable'.³³ The specific principles outlined are:

- » equitable access to land;
- » security of land rights;
- » sustainable and productive management of land resources;
- » transparent and cost effective administration of land;
- » sound conservation and protection of ecologically sensitive areas;
- » elimination of gender discrimination in law, customs and practices related to land and property in land; and
- » encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.

The CoK land policy principles encapsulate both moral/equity approaches to land and utilitarian/productive use of land.³⁴ They require the concerted efforts of both the National Governments and County Governments to realize. Under Article 60 (2), the principles are to be implemented through a national land policy developed and reviewed regularly by the national government and through legislation. While the National Government is mandated to develop the National Land

³² National Land Policy 2009.

³³ Article 60.

³⁴ P Kameri-Mbote, *The Land Question and Voting Patterns in Kenya*, in Kimani Njogu & P. Wafula Wekesa, *Kenya's 2013 General Election: Stakes, Practices and Outcomes*, Twaweza Publications (2015) pp. 34-47.

Policy NLC with advise from the NLC, there is a clear role for CGs to input into the Policy making the provisions on stakeholder engagement and public participation very critical. The National Land Use Policy (NLUP) also upholds the values of economic productivity, environmental sustainability and the conservation of culture while also facilitating the protection and optimal use of land.³⁵

The land question in Kenya has been the subject of many taskforces and commissions culminating in the National Land Policy 2009 and the Constitution's chapter five which spells out the principles of land policy, classifies land into public, community and private (specifying the coverage of each), regulation of land use and property and the establishment of the National Land Commission among others.

This audit addresses two critical aspects of land law and policy: Land tenure and Land use. The latter addresses questions of who holds, what interest in what land³⁶ while the latter deals with regulation of land use.³⁷ The national Land Commission Act which deals with public land affects public land in counties and the Environment and Land Court Act which deals with resolution of disputes relating to the use and occupation of, and title to, land is also relevant for this audit.

It is worth noting at the outset that although the Constitution has altered the land governance framework, Kenya's primary land tenure regime is still anchored mainly in the National Government.³⁸ The National Government has immense control over land registration, regulation, and definition and enforcement of property rights and contracts. Counties definitely have roles in these functions but they need to define those roles and ensure that the Constitutional imperatives of devolution, sustainable development, stakeholder engagement and public participation, are followed.

Most counties have narrowly defined the land question to involve planning and valuation. While these are important, they leave pertinent land governance issues that counties need to address such as:

- » Governance of unregistered trust land (nature and rules of trusteeship);
- » Governance of public land in the counties (nature and rules of trusteeship);
- » Planning for natural resource governance in counties (required for rangelands, forests, wildlife and fisheries);
- » Role of counties in renewal of land leases in lands in their jurisdiction;
- » Role of counties in land registration and enforcement of property rights;
- » Role of counties in land dispute resolution particularly the development of frameworks for alternative dispute resolution/traditional dispute resolution as encouraged in Article 67(2) (f) of the Constitution.
- » The role of counties in mediation of rights of diverse claimants in counties with critical resources such as water; oil; gas; coal.

Considering the importance of the land issue, it would have been prudent for each county to define its land question and then proceed to frame legislative and policy interventions to address

35 Government of Kenya, National Land Use Policy (2017) p. 6

36 The tenure issues are dealt with in the following laws: The Constitution; Land Act; Land Registration Act; Land Law Amendments 2016; the Community Land Act.

37 The regulation aspects are dealt with in the Physical Planning Act 1996, revised in 2012; Survey Act Cap 299; and the Valuation for Rating Act Cap 266.

38 Ellen M. Bassett. "The challenge of reforming land governance in Kenya under the 2010 Constitution", J. of Modern African Studies, © Cambridge University Press.

it. For instance, from the data currently available, about 60% of Kenya's land was trustland in 1994.³⁹ Indeed public land and private land were estimated at about 20% and below 20% respectively. There is a small number of counties in which the bulk of the land is registered. Most of the counties' land is not registered. This underscores the importance for each county to define its land issues and tailor interventions around the identified problems. Indeed, a process similar to the one followed at national levels where issues are identified; recommendations made should precede law making. Any policy issues identified should feed into the national policy on land and land use planning.

In this work, the various land laws and devolution laws should be scrutinized against the constitutional dispensation. First the land laws are audited to determine their compliance with the constitutional requirements on land and devolution and devolution laws. On the second section devolution laws are placed against the constitutional provisions to determine their level of conformance to the constitutional provisions on land. Notably, more emphasis is placed on the shortcomings of the Acts with regard to the devolution dispensation.

The laws and policies on land and physical planning are analysed with a view to identifying the extent of their conformance or non-conformance with the Constitution. The point made above is worth noting, namely that counties have not exhaustively addressed critical aspects of the land question. Even in areas such as planning and valuation where some attempts have been made, a lot more could be done. We note the slow pace of engaging counties in functions related to land evidenced by the fact that the Physical Planning Act is yet to be revised to give effect to devolution. The draft bill does not give effect to devolution and has remained in draft form for a while. Similarly, although survey is a county government function under the Constitution's Fourth Schedule, the Survey Act is yet to be amended to reflect this.

5.2 Land and Devolution

All land in Kenya belongs to the people of Kenya collectively, as a nation, as communities, and as individuals. Article 62 defines public land to include unalienated government land, the land occupied, held or used by a county organ except in leasehold, land transferred to the state and land in which the ownership cannot be ascertained. These categories of public land vest in and are held by a county government in trust for the people resident in the county.⁴⁰ The National Land Commission (NLC) administers and manages public land on behalf of the county governments. In this regard, NLC is required to identify and keep a data base for public land and may issue conditions as to the use of the land.⁴¹ Article 63 elaborates what constitutes community land. Importantly any unregistered community land is held in trust by county governments on behalf of the community. Notably, the Community Land Act, 2016 was enacted, and the registration of community land is in the process. The land is, therefore, moving from trusteeship of county governments to communities. It can only be hoped that this will not be dispossession of communities as has happened in the past.

Article 66 of the CoK provides that the state "may regulate the use of any land, or any interest in or right over any land, in the interest of defense, public safety, public order, public morality, public health, or land use planning". As such, both the county government and national government may limit the use of any category of land for public benefit.

The Fourth Schedule as read together with Article 186 of the COK distributes the functions between the two levels of government. In relation to land use and planning, the national

³⁹ Njonjo Commission Report, 2002

⁴⁰ Article 62(2)

⁴¹ Article 67

government is mandated to formulate “general principles of land planning” and “the coordination of planning by the counties.” On the other hand, the county governments are responsible for “county planning and development, including statistics, land survey and mapping, boundaries and fencing, housing and electricity and gas reticulation and energy regulation”. Although this is a shared function/ “concurrent jurisdiction” the substantive planning and developmental control is expressly the function of the county governments. County governments should, therefore, have very elaborate planning departments with full capacity.

Article 185 requires county assemblies to “receive and approve plans and policies for the management and exploitation of the county’s resources and the development and management of its infrastructure and institutions.” County assemblies are therefore institutions in planning affairs in the counties.

The National Land Commission (NLC) is established under Article 67 and is mandated to “recommend a national land policy to the national government, to monitor and have oversight responsibilities over land use planning throughout the country”. Consequently, with its oversight role, it can only carry out this mandate if the two levels of government cooperate with the Commission.

5.3 Legislation

The Physical Planning Act, No. 6 of 1996 (the PPA) entered into force in 1998 and applies to all parts of the Country except areas excluded by the Minister (now Cabinet Secretary in charge of Land & Planning).⁴²

As pointed out above, CoK 2010 created two levels of government: NG & CG and distributed specific functions to each of the government.⁴³ Importantly, each of the governments derives its powers and functions directly from the people. Section 3 of the PPA, establishes the office of the Director of Physical Planning (Director) whose functions include formulating national, regional and local physical development policies, guidelines and strategies; preparation of all regional and local physical development plans and ensuring enforcement by local authorities of physical development control and preservation orders.

The PPA defines a “regional physical development plan” as a plan for the area or part thereof of a county council.⁴⁴ In the post-Constitution of Kenya 2010 dispensation, this definition is obsolete. A regional physical development plan in post-2010 would be a joint agreement between counties located in adjacent areas and having same or similar topographic, development agendas and economic activities. Such an agreement would be at sole discretion of the counties as each of the counties is distinct in its composition, functioning, and enforcement of its laws.⁴⁵ It is notable that the PPA does not provide guidelines on the formulation of such regional development plans/ agreements to avoid prejudicing national planning principles.

The Constitution envisages two planning authorities; the national and the county government. Any institution or office created after that indisputably must fall into these two categories and subject to the control of the respective government. The Director of Physical Planning should be an office in the NG responsible for the formulation of principles and coordination of planning by counties. The formulation of regional and local physical development plans and enforcement of such development controls within the counties is the function of CGs.

42 Njonjo Commission Report, 2002

43 Article 62(2)

44 Article 67

45 Article 6 and The First Schedule of the Constitution provides for division of the Kenya into forty seven counties.

The PPA does not create a forum for a consultation yet land planning is a shared function. Inadequate consultation and cooperation have led to deteriorating planning and adherence to planning requirements. Cooperation of these two governments is inextricably linked to the proper harmonized formulation of policies, management, development and planning of land.⁴⁶ A forum composing of NG and CG representatives and the NLC is required to ensure cooperation and consultation in line with Article 6(2). County planning should be aligned with the national principles developed by the NG. Invariably, the consultation forum should be under the Intergovernmental Relations Act, 2012. Any attempt to establish a statutory body is an emasculation of the county governments.

Section 32 of the PPA requires that a development application before the local authority be forwarded to the Director for consideration and comments. Development approvals are strictly within the purview of the counties and units underneath the counties. To the extent that the NG functions are limited to the formulation of general principles and coordination of planning by counties renders the Director's office redundant in this regard.

One pillar of devolution in Kenyan set up is to ensure increased public participation in the management of the county affairs at every stage of decision making. The PPA mandates the planning authority to develop plans and only invite objections to an already developed plan.⁴⁷ In Article 10 and indeed as an object of devolution, the public must be involved in the formulation of such development plans for effective plans to be developed. Participation should be in good faith, substantial as opposed to tokenism and their contributions must be considered.⁴⁸ Similarly, the procedure for application and approval of development does not envisage public participation.⁴⁹

The PPA concentrates powers of planning in the office of the Director, who formulate all policies. Article 184, 6 and 174 aim at having the services and decision making devolved to the lowest manageable level to give the residents power to govern themselves activities in their localities. Towns, municipalities and other smaller units should be given the power to develop their plans subject to approval by the County planning unit. Indeed, the Urban Areas and Cities Act provides for such a set up.⁵⁰

The purpose of development control is to ensure economic land use by allocating the resources to maximize their benefits.⁵¹ Article 60 requires that land be managed in an equitable, efficient, productive and sustainable manner. Additionally, the use of the land use should ensure sustainable and productive, transparent and cost-effective management of land. Article 10 contains principles such as social justice, equality, inclusiveness, integrity and sustainable development. These are binding principles that should be adhered to in land planning. The PPA does not adopt these provisions and does not contain planning principles.

Section 44 of the PPA, provides that the information obtained by the Director or any official of a local authority be confidential and invokes the provisions of Official Secrets Act.⁵² This provision is untenable and undesired in devolution on two fronts. First, public information requires an informed public, and it is vital in holding the office bearers accountable for their actions. Indeed, Article 10 requires transparency, accountability. Further Articles 35 guarantees right to access to

46 Council of Governors & 3 others v Senate & 53 others [2015] eKLR

47 Section 9

48 Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014]

49 Section 33

50 Section 20

51 John Mutingá Mativo, The Role of Law in Urban Planning in Kenya: Towards Norms of Good Urban Governance, LL.M thesis, University of Nairobi (2015)

52 Chapter 187, Laws of Kenya

information. Although there should not be gratuitous divulgence of information, limitation of access to planning records should be subject to Access of Information Act.⁵³

The PPA does not envisage a county assembly in planning. As the representative arm of a county government, the county assembly role cannot be underestimated. An integrated plan is a road map within which the county government must operate if it is to deliver to the people. The implementation of the plan requires of various stakeholders and such a road map cannot be legitimate without the voice of the people through their representatives.

The Physical Planning Act does not envisage devolution provisions in the CoK 2010; the County Government Act; Urban Areas and Cities Act; Intergovernmental Relations Act, 2012 and the Devolved Functions Legal Notice 116 of 2013 that devolved the county planning.

Physical Planning Bill 2017

The Physical Planning Bill (Bill) is supposed to revise the Physical Planning Act discussed above. It however replicates many provisions of the Act instead of overhauling it to reflect devolution imperatives. Below are some of the ways in which the Bill runs contrary to the CoK provisions and overall spirit of devolution.

National Physical Development Plan

The most critical invention of the devolution was to enable development that is sensitive to the local conditions and needs in a particular county and smaller units. As such, consideration of what each county requires is a crucial principle of devolution that must be put into consideration at all times. In this regard, the Constitution recognizes this fact by limiting the function of the national government to policy and coordination of the planning in the country. The actual development plans are left to the county governments to develop plans that are sensitive to the specific county needs.

Section 17 of the Bill envisages a National Physical Development Plan (NPDP) whose contents are to “define strategic policies for the determination of the general National Physical direction and trends of physical development and sectoral development in Kenya and provide a framework for the use and development of land”. Further, the NPDP should contain “maps and plans showing current and anticipated physical and land use patterns, an implementation framework” In the formulation of county plans and local plans as well as regional plans, county governments are to ensure that the respective plans conform to the NPDP. Measured against the functions of the national government, it is clear that planning should begin at the lower levels where land is used. This provision therefore offends the Fourth Schedule, Article 186 and Article 6. The NPDP should draw from County Physical Development Plans, which take into account the local planning priorities.

Approving and Implementation of Plans

Related to the issue of NPDP, Section 22 of the Bill requires NPDP to be approved by the Cabinet, which then is to be complied with by all the counties. Section 29 of the Bill further requires that the Cabinet Secretary and the National Director of Physical Planning approve Regional Development Plans. Additionally, implementation of the NPDP is vested in Cabinet Secretary and the NLC. Under the Fourth Schedule approving of any county plan including Regional Development Plan cannot be said to be a function of National Government. The scope of its functions is to prepare general principles and policy and cannot approval and compliance with the NPDP must be linked to approval and compliance with CPDPs. Counties should avail their CPDPs for review.

53 No. 31 of 2016.

Enforcement mechanism

The National Government after setting principles and planning policy, there should be a mechanism of ensuring that county government adheres to the dictates of the principles and policies. The National Physical Planning Consultative Forum established under section 5 of the Bill is intended to bring together the national government and county governments. Notably, Article 6 requires consultation and cooperation and the Intergovernmental and Relations Act, 2012 has already set up institutions under Article 189. This forum is a duplication of the roles of the institutions established under intergovernmental relations law. Understandably, the two levels of government may form joint committees, but the composition of this forum just serves the function of re-centralization of planning role to national government. The coordination of planning by national government cannot be the objective of this body looking at its composition and functions.

National Land Commission

Perhaps the most significant blow in the Bill is to the NLC. Under Article 67, NLC is mandated to recommend a national land policy which when interpreted broadly is expected to include land use and planning principles and policies. Although the Chairperson of the NLC is a member of the National Physical Consultative Forum, this is tokenism to NLC. It would be expected that the National Government would substantively engage NLC and allow it to review and make recommendations as an institution in the development of policies and principles. Clearly the rationale of having a land commission in land policies formulation must be appreciated. The National Government launched the National Land Use Policy in June 2018.

Section 24 of the Bill requires that every national government institution responsible for implementation of NPDP should prepare status report three months to the end of the financial year and submit it to the CS and the NLC. Oversight and monitoring of land use planning is a function of the NLC, and if CS is a planning authority as defined in Section 2 of the Bill, monitoring and oversight roles cannot again vest in CS.

The spirit of the bill and its provisions generally demonstrates the dislike of the Ministry Land on National Land Commission. While NLC has a significant role in policy-making and planning under the Constitution, the Bill tangentially engages NLC reducing it to “any other party” like National Director of Planning while indeed in the Constitution, NLC is intended to be a key partner in planning.

National Director of Physical Planning and the Cabinet Secretary

The retaining of this office in the Bill demonstrates the intention to retain the old order. Among functions of the office, holder is to advise the government on various physical planning issues. We can only assume that the government here means national government. He also formulates national policies and planning policies and coordinates the preparation of regional integration. Although he is responsible to the CS, formulation of principles and policies is also a function of the Cabinet Secretary. It is this lack of clarity and duplication of functions that has led the planning mess that we are in. It is crucial that his functions be subject to the CS for clear-cut command, transparency, and accountability. As stated elsewhere, he is also the chairperson of regional development committee yet counties are distinct and separate. This is a move to recentralize planning. A department under the CS can handle the functions of the Director of Planning. He can be an adviser to a regional development planning policy, but the chairpersonship is suspicious.

Public Participation and Culture of Secrecy

In various forums, for instance, the Regional Physical Development Plan does not provide a representation of residents of various counties in development of the regional plans. Similarly,

the Bill does not envisage disclosure of information related to planning. Information obtained is treated as confidential.

Role of County Assembly

Article 185 requires the county plan to be approved by the county assemblies. Interestingly, Section 37 of Bill does not require such approval. Section 38 provides for modification of County Development Plans by the county executive member in charge of planning again without the approval of the county assembly. Additionally, section 39 adopts the same spirit. Section 47 also ousts county assembly role in local planning.

The Bill also seeks to amend Section 104 and 103 of the County Government whose effect is to oust county assembly role in planning.

The Physical Planning Bill and County Government Act

Section 8 of the County Government Act, 2012 (CGA) echoes Article 185 of the Constitution on the role of county assemblies on planning. Specifically, Section 8 provides that the county assemblies shall “approve county development planning”. Similarly, section 30 requires county governor to submit the county plans and policies for approval. Removal of the County Assemblies role by the Bill from plans approval goes against the Act and the Constitutional.

Section 37 of the CGA provides the roles of the county executive committee. The CEC monitors the process of planning, formulation and adoption of the integrated development plan by a city or municipality within the county, assist a city or municipality with the planning, formulation, adoption and review of its integrated development plan, facilitate the coordination and alignment of integrated development plans of different cities or municipalities within the county and with the plans, strategies and programmes of national and county governments, take appropriate steps to resolve any disputes or differences in connection with the planning, formulation, adoption or review of an integrated development plan.

The Bill has wholly omitted the role of CEC in planning and instead leaves the role to Executive county executive member responsible for planning and the county development director.

Although the Bill recognizes that the county has planning functions, it fails to recognize established devolved units such as the Sub-county administrator and Ward administrator who are critical officials in planning at local level. It is a move to create a centralized planning authority at the county level.

Section 103 CGA provides that the county planning unit is responsible for coordinating integrated development planning within the county, ensuring integrated planning within the county; ensuring linkages between county plans and the national planning framework. Further, the designated planning authority in the county should appropriately organize for the effective implementation of the planning function within the county. The Bill establishes the Director of County Planning; it can only be hoped that the Bill establishes the Directorate of County Planning in the county governments, which will be planning unit envisaged in the CGA.

Section 106 of the CGA provides that cooperation in planning shall be undertaken in the context of the law governing inter-governmental relations. The law governing the intergovernmental relations is the Intergovernmental Relations Act (IRA). The national government can, therefore, coordinate the planning under the IRA.

Section 39 of the Bill provides for revision of plans not before eight years. Under the section 109, the CGA provides that the sectoral plans should be reviewed every five years and updated annually. The role of county assembly is ousted despite section 109 providing that the county assembly must approve revision.

Section 114 of the CGA requires the approval of significant projects in the county by county assembly. The Bill in section 63 provides that the Cabinet Secretary shall consider and offer Strategic national policy guidance to any public institution proposing a project's project of strategic national importance. This provision may serve to subject county governments to CS approval without county assemblies.

The Physical Planning Bill and Urban Areas and Cities Act, 2011 (UACA)

The Bill defines a local physical development in section 2 as “plan for the area or part thereof of a city, municipal, town or urban council and includes a plan with reference to any trading or marketing center” The UACA establishes the various urban areas within a county including towns, municipal cities, and cities. The management of these small units within a county is managed by boards appointed under the Act. The boards are agents of the county government and are responsible and accountable to the county governments.

Section 16 of the Urban Areas and Cities Act, 2011 (UACA) provides for the various functions of the respective boards which include to “develop and adopt policies, plans., control land use, land sub-division, land development and zoning by public and private sectors for any purpose, including industry, commerce, markets, shopping and other employment centres, residential areas, recreational areas, parks, entertainment, passenger transport, agriculture, and freight and transit stations within the framework of the spatial and master plans for the city or municipality as may be delegated by the county government”. Essentially, the managers of these boards then are to submit their proposed plans to the county executive committee for consideration and then to county assembly for approval.

Section 16 of the Bill provides for the functions of County Director of Physical Planning including “preparation of local physical development plans.” This is apparently in conflict with the UACA, and if adopted as it is, it will only lead to confusion.

Evidently, the primary effect of the Bill on the UACA is centralization of the land use planning function in the office of the County Director of Physical Planning. Although both the Director and the boards work under the county government, the Bill only creates confusion as whom the boards should be answerable to; executive committee or the Director is now not clear. Devolution aimed to devolve power to the lowest unit possible but not to create centralized county capitals.

Physical Planning Bill and Environment and Land Court Act

Section 16 of the Act provides that appeals from subordinate courts or tribunals appeal to the court within thirty days. Section 74 of the Bill, however, states that a determination by County Physical Appeal Physical Planning Liaison Committee should be filed with Environment and Land Court and the court shall record the determination of the committee as a judgment of the court. This denies an aggrieved party the opportunity to access the court. If the determination is recorded as the decision of the court, an appeal can only lie with the Court of Appeal, which is unnecessary. The bill should allow a direct appeal to the Court for a review.

Physical Planning Bill and Intergovernmental Relations Act, 2012

The IRA objects include provide a framework for consultation and cooperation between the national and county governments; provide a framework for consultation and cooperation amongst county governments. The Act establishes institutional structures whose objects include providing a forum for co-ordinating governments' policies, legislation, and functions. One of the functions of the Summit, for instance, is to monitoring the implementation of national and county development plans and recommending appropriate action.

On the technical committee, the CS may convene consultative fora on sectoral issues of common interest to the national and county governments. It would be hoped that any coordination in

policy implementation and planning would be under this Act, unlike the Bill that forms an organ at the national level whose only function is to revert the planning function to the national level.

The Land Act, 2012

Section 20 of the Land Act provides that the Commission may grant a person a license to use the unalienated public land for a period not exceeding five years subject to planning principles as it may prescribe. Although under Article 67 NLC is responsible for administering and managing public land, the planning rests with county governments. NLC can only prescribe the planning on public land in consultation with the county governments

Section 6 of the Land Act provides that the CS shall be responsible for monitoring and evaluation of land sector performance as well as providing policy direction of the regarding all classes of land in consultation with the Commission. It would be expected, as it is, county governments are vital partners in land matters and county governments would be involved in directions involving land.

Section 146 of the Land Act requires the CS to approve creation for a right of way to the exclusion of a county government yet it would require some land control and planning.

As noted elsewhere, some public lands vest in the CGs and are administered by the NLC on their behalf. The Land Act provides for conversion of different tenure to another. In this regard, public land held by counties may be converted to private land. Section 9 of the Land Act requires that any substantial transaction involving the conversion of public land to private land should be approved by the county assembly.

Land Act and the County Government Act, 2012

Section 6 of the Land Act provides that the coordination of the spatial plan data ought to be in consultation with the county governments or their representatives because it is a shared function.

Section 17 of the Land Act requires a management body to submit development plans to NLC before a reserved public land must require the CGs to approve plan since the commission in the management of the public land.

Section 20 provides for issuing of licenses of public land by the NLC. Understandably, NLC should consult the CGs whom they manage land for when issuing licenses.

Section 134 of the Land Act provides for the settlement schemes to be administered by the NG for shelter and livelihood. Land settlement should include CG involvement as these are established within counties yet the role of CG is not well articulated. The CG is involved in the identification of beneficiaries should be consulted by the NG. The nature of the consultation is not clear and there are no CG representatives in the Land Settlement Fund Board.

Land Act and Urban Areas and Cities Act, 2011

The Land Act refers to the county governments without recognizing the devolved units in the Urban Areas and Cities Act. Although they act within the county governments, they are recognized in law to promote locally sensitive land administration and planning.

Community Land Act

The Community Land Act was enacted to give effect to Article 63(5) of the Constitution. It provides a mechanism for recognizing, protecting, registering and managing, the land.

The use of the community land is subject to regulation and should conform to the national and county laws and policies. Community land management committees are responsible for the planning of the respective registered community land.⁵⁴

In Section 19, a registered community or at the request of the county government should submit a plan for development, management and use of the land registered under the community for approval. The plan should consider the environmental conservation and heritage and should be bound by any physical plan. The county government should consider the plan in line with the development planning laws in place. If the county approves the plan, it should notify the registered community and the community shall develop the land in line with the approved plan.

The Act clearly recognizes the role of county governments in planning and management of lands within their jurisdiction.

Unregistered community land is held in trust by county governments on behalf of the communities for which it is held.⁵⁵ Unregistered community land is held by CGs in trust for the communities. Registration of the community land will, therefore bring the trust to an end⁵⁶ and devolve the management of the unregistered land to the community after adjudication is done to ascertain the members of the community. The nature of this trusteeship is not defined. The problem lies in interim arrangements.⁵⁷ Section 6-11 of the Community Land Act allow the CS to appoint the Adjudication officer to ascertain claimants of the registration of communities in consultation with the CGs. Whereas the consultation with the CGs is desirable, having held the land subject of registration previously and with the history of the non-recognition of community land rights and wanton illegal allocation of the land, there is need for better definition of CG trusteeship and greater CG engagement in the registration process to avoid dispossession of the land as happened in the Coast in the hands of the NG. The CGs would, for instance, involve its officers in conjunction with the NG adjudication officers to facilitate the registration process. We have pointed out above the role of the CG in registration needs to be articulated. This is particularly the case in community land.

The Community Land Act concentrates many powers in the Cabinet Secretary leaving out the NLC and the CGs despite their being key stakeholders. It is the mistrust in the NG that led to recommendations in the Constitution and the National Land Policy for the removal of community land management from the NG. This recentralization and minimal control by the CGs is not desirable.

Community Land Act and County Government Act

Section 19 of the Community Land Act provides for the submission of a community development plan to the county government for approval. However, under the Act it adopts a very generic view of a county government and fails to recognize the various county government devolved units that are involved in the county planning in the County Governments Act.

Section 29 allows a registered community to reserve land for settlement, community conservation areas, farming, and urban development. These reservations have an impact on the land use and planning and they ought to obtain the consent of the county government in their areas as provided under the County Government Act, 2012.

54 Section 15

55 Art. 63 (3)).

56 Community Land Act Section 6 (7))

57 Liz Alden Wily “The Community Land Act in Kenya Opportunities and Challenges for Communities”, Van Vollenhoven Institute, Leiden Law School, Box 9520, 2300 RA Leiden, The Netherlands (19 January 2018).

Urban Areas and Cities Act, 2011 and Community Land Act

The Community Land Act completely obscures the role of devolved units in the UACA. The assumption seems to be that community land is outside cities and urban areas. This is a fallacious assumption because of the interaction between community lands and urban areas and cities as more people move to these spaces and land is carved out of community land to accommodate these devolved units of governance.

Land Registration Act

The Land Registration Act governs the registration of all land in Kenya. Land registered is within counties. The Supreme Court Advisory Opinion that delineated the roles of the NLC and the Ministry regarding registration of Land clarified the roles of these two actors but did not address the roles of the CG. These two actors are at the national level. As noted above, there is need for clarity on the roles of the CG in adjudication, registration of land and the enforcement of land contracts.

National Land Commission Act, 2012

The Land Laws Amendment Act 2016 did away with the county land management boards that had seen the county governments have a say at the NLC. Under the current framework, NLC is purely a national government institution without representation from the county governments. It is difficult to see how it will cooperate with the county governments given that it administers public land on behalf of the County governments.

Article 67(2) requires the Commission to “monitor and have oversight responsibilities over land use planning throughout the country”. Further, the National Land Commission requires that the Commission identify, prepare keep a date base all public land while the Section 17 (3) requires the Commission to approve all the developmental plans, management and use of public land vested in a state organ including a county government organ.

The role of the Commission in physical planning, management and land use in the counties requires goodwill and cooperation. Notably, the County Land Development Boards were repealed.⁵⁸ The Act fails to create a link between the Commission and the county governments.

NLC Act and County Government Act

The Act has blanket consultation requirements. In the management of the land, the Act does not provide anything on county governments and the county devolved units such as sub-counties, wards other than requiring that an office of the NLC be established in each County. It also states that the NLC shall establish offices in the counties and may establish offices in the sub-counties as it may consider necessary.⁵⁹

NLC and Intergovernmental Relations Act

Dispute resolution in Land Act and Land Registration Act have not provided or envisaged any plan to have the dispute resolution that may arise solved through Intergovernmental Land Relations Act.

Land Adjudication Act

The Amendments introduced to this Act in the post-2010 era are of no significant effect. Secondly, the enactment of the Community Land Act, 2016 dealt a blow to this Act as it gives the Cabinet Secretary the power to appoint adjudication officers in each of the community registration unit.

⁵⁸ Land Laws Amendment Act, 2016.

⁵⁹ NLC section 16(5).

However, in the transition section, the Community Land Act (CLA) saves the Land Adjudication for three years or more time as the Cabinet Secretary may gazette.

Just like the Community Land Act, it leaves out the role of CGs and the NLC is the adjudication process, which includes surveying and mapping which would touch on land use and planning.

Importantly, now that the CLA is in place, it should apply in the adjudication of the rights and should not be applied on requests, should apply on all the land processes as the community land rights are being registered.

This Act has various inconsistencies with the Land Registration Act, 2012 and the Community Land Act.

Land Control Act

Articles 10 and 60 envisage the sustainable use of resources. Article 60 expressly provides for the principles of land policy including “sustainable and productive management of land resources”. The sustainable and productive use of land could only achieve through police power in control of subdivisions, the partition of land among other transactions.

The county governments through land use and planning are essential institutions in achieving the sustainable and productive management of land. The National Land Commission, having the oversight role in planning is also a key player in ensuring sustainable land use.

The Land Control Act, in section 6 delineates parcels of land that are subject to this application of the Act. By the very role of county governments in land use and planning, formation and constitution of land control boards, delineation of board’s jurisdiction imports the role of county governments. The Cabinet Secretary cannot, therefore, form or purport to constitute land control boards without representatives from the county governments to ensure that the land transaction adheres to land use and planning principles.

Provincial land control board appeals and central control appeal board have no place in the post-2010 era. Further, their constitution does not envisage county governments.

This Act does not envisage devolution and county governments in general. It offends devolution laws by this very fact. The control, which it imposes on agricultural land, is itself a land use and planning issue and as such county governments ought to be involved.

Valuation for Rating Act

Land valuation and taxation is a critical component of land governance. The Valuation for Rating Act provides for the preparation of valuation rolls to facilitate efficient collection of rates and taxes. CGs collect rates while the NG collects Stamp Duty and Capital Gains Tax. Rates and stamp duty are predicated on updated valuations of land. Unfortunately the valuation rolls in Kenya are out of date and most transactions in land are based on estimated values versus real values.⁶⁰ There is need to link the national cadaster to the national land tax and rent database. Both the updating of valuation rolls and updating the land tax and rent database require joint actions of the CGs and NG. Indeed tax and rates are levied on very few properties currently. There is need to update land information capturing all properties. Updated valuation rolls are important parts of the CGs role on.

The role of CGs in valuation is outlined in the NLUP, which provides that “land valuation and taxation shall be based on approved development plans and relevant local area land use and development guidelines”. It is a matter of concern that the task of developing the framework

60 P. Kameri-Mbote, Kenya Land Governance Assessment Framework (LGAF) (2018) University of Nairobi School of Law

guidelines on valuation of land and land based resources is assigned to NG institutions (Ministries in charge of land and environment) and excludes CGs.

Survey Act

We noted that survey is a function of the CG. However, the Survey Act Cap 299 has not been revised to reflect the reality of devolved governance. Link in Physical Planning, the role of the Director of Survey is very prominent.

5.4 National Policies

A number of policies are worth noting here. The first is the National Land Policy. **The National Land Policy**, Sessional Paper No. 3 of 2009 predates the Constitution and does not therefore capture the institutional architecture of devolution in the 2010 Constitution. The Policy is however a very comprehensive document and captures the spirit of land reforms that informed the Constitution. These include the principles of land policy; the provisions on land tenure and land use. The Policy, like the Constitution provides for three modes of holding land: public; community and private. In coming up with these tenure typologies, it critically analyses the problems with the prior categorizations. Worth noting is the designation of land a government which had resulted in abuse of powers of allocations chronicled in the Ndung'u Report. While the Ndung'u Report addressed the conversion of public land ownership to individual land ownership, the Land Policy also highlighted the conversion of land under group tenure (trust land and group ranches) to individual tenure and the abuse of power by local authorities (the precursors to counties) in dealing with trust land and officials of group ranches in dealing with group ranches. The Policy also highlighted the opaque ways in which compulsory acquisition was carried out and the failure of planning authorities and non-adherence with planning laws. These are pertinent issues for the county governments.

The **National Spatial Plan 2015-2045** is a national spatial vision that charts the path for physical planning in the country. CGs have physical planning functions but in the list of those consulted in the drawing of the Plan they are conspicuously missing. The list includes very many NG institutions, which points to an attempt at recentralizing planning. While both NG and CGs have roles in planning, neither of them can execute the physical planning function on its own.

The **National Land Policy** pointed to the need for a National Land Use Policy and it is good to note that the National Land Use Policy was passed in 2017 and launched in 2018. It is interesting to note that in its guiding principles, devolution is not included. The counties are only listed for purposes of computing demographic data. The need to share information is only couched at the level of Ministries, Departments and Agencies of NG and does not explicitly bring in CGs and institutions under them. On land administration, registration and management of transactions, the Policy does not rope in CG institutions. It recommends the predicating of the national cadaster on national spatial plans and policy guidelines and does not include CGs. Similarly land tax and rates are linked to the national cadastre with no information on how information from counties will be leveraged.

Table 14: Matrix Audit for the Land and Planning laws

Name of Law	Issue	Rationale/Concern	Recommendation
	Make the argument. E.g. separation of powers. Where is the problem or inconsistency?	How do we ameliorate the problem?	Amend the law as so..... Or Repeal the law in its entirety.
Constitution	Designates land as public, private and community but the data on the acreage is dated. Need for inventory of all public land. Need for land information data/statistics from county to feed into national government data.	Take stock of land tenure and land use types in the country to enable counties and national government know what land they are dealing with. This is long overdue. Establish county land information hubs to collect necessary data and statistics.	Designate public, private and community land in Kenya. Inventory of public land.
1. Physical Planning Bill 2017 (Seeks to amend the Physical Planning Act	The Bill approaches planning from a national level yet planning under the Fourth Schedule is a County function. Section 37 offends Constitutional provision that requires County Developments plans to be approved by County assemblies.	The County Physical Development Plans should inform the development of the National Physical Development Plan. National Government should only provide general principles of land planning and coordinate planning by the counties.	County Physical Development Plans made and approved by County Assemblies and then amalgamate them into the National Development Plan. Align the Bill to the dictates of devolution and specifically the principles of cooperation and consultation. Integrate the requirement for public participation as outlined in the Constitution.
	Bill centralizes planning function and seems to be aided further by membership of the Cabinet secretary on the Technical Committee. The Cabinet Secretary may convene consultative forums on sectoral issues of common interest to the national and county governments. Similarly preparation of national, regional and local plans is a function of the Director of Physical Planning under the Bill	There is need to shield this function from National Government control by organizing the Intergovernmental Relations Technical Committee to perform it.	Align the Bill to the imperatives of a devolved government by providing for consultation and cooperation in the preparation of plans and respecting the roles of the County Assembly and Executive in the process. The Fourth Schedule has defined the roles of National and County Governments in planning and these should be respected.
2. The Physical Planning Act	The Bill discussed above seeks to amend this Act. It is framed in the pre-devolution structure of centralized governance.	The Constitutional demarcation of functions between the National and County Governments and the National Land Use Planning Policy should inform the review of this law.	This law should be repealed and replaced with a law aligned to the Constitutional provisions on devolved government. Harmonize the new Physical Planning law with the Urban

Name of Law	Issue	Rationale/Concern	Recommendation
			Areas and Cities Act; the Intergovernmental Relations Act; the County Governments Act and Legal Notice 116 of 2013.
3. Land Act	Defines the roles of the Cabinet Secretary and the National Land Commission with respect to land. The clarification of these roles in the 2015 Supreme Court Advisory Opinion does not address the County role.	Clarify the role of Counties vis a vis MOLPP and NLC.	Make provision beyond the MOLPP and NLC Clarify role of counties in land adjudication and registration.
	S. 6 CS is responsible for land sector performance monitoring and evaluation in consultation with the NLC.	Counties are critical stakeholders in the land sector and should also be included.	Make provision for consultation with counties in land sector performance monitoring and evaluation.
	S. 146 CS approves creation of right of way without express requirement for the involvement of the county government.	Land use planning may be needed in the process of creating rights of way and this is the function of the counties.	Make express provision for the involvement of county governments.
	S. 9 requires that any substantial transaction involving the conversion of public land to private land should be approved by the county assembly.	There is no definition of what constitutes 'a substantial transaction'.	Need to clarify what substantial means so as to be clear on the instances in which the County assembly will be engaged.
	S. 134 on establishment of settlement schemes, the role of County Governments is not very clear.	Development and spatial plans in counties need to factor in settlement schemes and this needs to be provided for.	Clarify the role of counties in the establishment of settlement schemes and the place of such schemes in County Integrated Development Plans and County Physical Development Plans
	Land Act treats county governments as organic entities and does not recognize cities, towns and urban areas as sub-parts of the County.	These sub parts promote local sensitive land administration and planning and should be recognized.	Make provision for cities, towns and urban areas.
4. Community Land Act	Concentrates powers in the Cabinet Secretary	Involving the Cabinet Secretary too much removes from the intended purpose of granting communities agency over their land.	Need to relook at the Act to grant communities agency over their land within counties.

Table 14: Matrix Audit for the Land and Planning laws (Cont'd)

Name of Law	Issue	Rationale/Concern	Recommendation
		It also does not recognize the role that counties play in community land.	
	S. 6 County to hold unregistered community land in trust for the community.	The local authorities that held trust land in trust for the communities before the enactment of this law abused the trust.	Need for definition of terms of trusteeship to ensure that the integrity of community land is maintained. What are the obligations of the County as trustee? County needs to develop trusteeship rules.
	S. 6 (6) (6) Any transaction in relation to unregistered community land within the county shall be in accordance with the provisions of this Act and any other applicable law.	Article 63: The Constitution directs that community land “shall not be disposed or otherwise used until legislation. specifies the nature and rights of members of each community individually and collectively”. CLA is the Act; Need to clarify what ‘transaction’ is anticipated here as Constitution bars all dealings with community land.	
	S. 8 Registration of Community land.	Land Registration Act & Regulations (2017) have not spelt out role of counties in the Regulations.	
5. Land Registration Act No. 3 2012	One of the imports of the LRA is to give effect to devolution but it is not clear how this is done in the Act. The County Land Registrar is responsible for administering registries within county and in the implementation of policies, guidelines and strategies in accordance with this Act. The role of the County Land Registrar is however not clearly linked to overall County Administration.	Land registration should respond to county needs and be linked to county planning and development.	Though land registration is remit of Ministry, land registered is in counties. Link County Land Registrar to County Executive in charge of land function and overall County Administration. Clarify the role of /relationship with the County Land Registrar in the registration of community land within the county.

Name of Law	Issue	Rationale/Concern	Recommendation
	No recognition of the role of the Intergovernmental Relations Committee in settling land disputes.	Boundary land disputes between counties can be addressed by the Intergovernmental Relations Committee.	Provide for the role of the Intergovernmental Relations Committee in dealing with boundary land disputes.
<u>6. Land Adjudication Act</u>	This law remains effective for three years after the enactment of the community Land Act 2016. It gives the Cabinet Secretary power to appoint adjudication officers for community registration units. It does not provide for the involvement of counties in the adjudication process.	The adjudication process may touch on land use planning which is the remit of county governments.	Provide for the involvement of county governments in land adjudication.
<u>7. The Land Control Act</u>	The framing of this Act does not take on board devolved units of government. The NG appoints Land Control Boards while issues they are looking into are within counties. CG currently has no role in these boards	The control over agricultural land, which is a land use and planning issue. This is in addition to agriculture being a county government function. Revise the Land Control Act and define CG roles in it.	Rethink the place of this statute within the context of devolution and either repeal the law and make provision for protecting the interests it seeks to protect through other devolution laws or align it to the imperatives of devolution. Provide for role of CG in Land Control Board Processes.
<u>8. Land Law Amendments 2016</u>	Concentrated on defining the relationship between the National Land Commission and the Ministry, which was very frosty. The two actors are at the national level NLC powers to initiate allocation of public land moved.	The conflicting mandates of the National Land Commission, the Ministry and Counties with respect to land management and administration need to be isolated and dealt with. Amendment shifts power to initiate the allocation of public land to the national or county government. MOLPP, NLC & Counties have different functions with respect to land but import of these amendments was to place land registration, regulation, and definition and enforcement of property rights and contracts in the National Government.	Look at Land Laws with a devolution lens and facilitate the delineation of functions to enable counties to carry out their land use planning function effectively. Need for counties to define how they exercise this power. Need to define County role in land governance clearly. Need to define the role of County Governments in land registration, regulation, and enforcement of land rights. Need for robust definition of land question in each county so as to define functions of the County Executive responsible for land.

Table 14: Matrix Audit for the Land and Planning laws (Cont'd)

Name of Law	Issue	Rationale/Concern	Recommendation
	S. 8 (4) County Land Registrar shall be responsible for administering registers within the county and in the implementation of policies, guidelines, strategies in accordance with this Act.	Note above the identified need to link the County Land Registrar to the County. As is couched, the CLR is an appendage of the NG.	Define CG role in land adjudication and registration and define County policies, guidelines, strategies in this area which should dovetail the National policies, guidelines, strategies.
<u>Valuation for Rating Act Cap 266</u>	Valuation aids both National Government and County Government in collection of stamp duty and rates.	Updating of valuation rolls should be done as a matter of urgency to enable both National Government and County Government to perform their tasks.	Review the Act to clarify roles of County Government and National Government.
<u>Survey Act Cap 299</u>	Survey function still anchored in the National Government despite provisions of 4 th Schedule which make land survey and mapping a CG function.	The Survey Act should be aligned with the Constitutional delineation of functions between the NG & the CG. For instance “ surveyor ” in the Act means a Government surveyor or a licensed surveyor. Government is NG and licensing and regulation of surveyors entrenches NG function.	Repeal the Survey Act and replace with law that reflects Constitutional provisions on devolution and assignment of roles to NG and CG.
<u>The National Land Policy Sessional Paper No. 3 of 2009</u>	The first ever NLP to guide country towards efficient, sustainable and equitable use of land for prosperity and posterity Constitution requires that NLP be anchor of constitutional principles on land & that Policy should be developed & reviewed regularly by NG.	It predates the 2010 Constitution and while anticipating decentralization, does not include devolution entities as captured in the Constitution. Need for new NLP anchored in Constitution taking onboard devolution.	Revise the NLP. It was to be capture the institutional framework provided for in the Constitution. It was to be reviewed every 10 years and it is in its 9 th year so it needs to be reviewed to capture the developments in the land sector and the institutional framework for land governance. Review the National Land Policy.
	Constitution provides for settlement of land disputes by establishing the Environment & Land Court & encouraging resolution of land disputes using local community initiatives	The Environment & Land Court Act has established ELC courts but they do not cover all counties. There is no framework for resolution of land disputes using local community initiatives.	Law to require deployment of ELC judges to all counties of for predetermined populations in different counties. Counties to work with NG in putting together framework resolution of land disputes using local community initiatives and adhering to the Constitution.

Name of Law	Issue	Rationale/Concern	Recommendation
9. National Spatial Plan 2015-2045	Provides for the development of administrative centres most of which will be in counties	Need to harmonize planning imperatives at national and county levels	Align National spatial plan and county development plans
10. National Land Use Plan 2017	Needs to have taken the County physical plans as starting point.	National Plan should be amalgamation of county plans taking on board national planning imperatives.	Ensure National Land Use Plan takes on board County Planning needs.
9. Kisii County Rating Bill 2014	S. 12 –penalty to be charged on interest for late payment at rates to be determined by county assembly. S. 11 discount for early payment of rates by county assembly.	There might be a challenge enforcing this unless there is a standard measure so that the waiver or discount of rates will not be abused or subject to whims.	Provide a standard measure and put in place mechanisms to prevent abuse.
10. The Nyeri County Physical Planning Bill, 2015	Too many institutions created under the Bill.	Risk of overlaps thereby hampering proper functioning.	Streamline institutions under the bill.
11. Nairobi City County Regularisation of Developments Act, No 3 of 2015	Section 5(3) provides for extension of regularization period by no more than 6 months for more than once.	This is likely to be abused and may turn out to being extended into perpetuity thus defeating the object of the law.	Need for a cap on how many times the extension may be done. (possibly twice).

5.5 Conclusion

From the foregoing, it is clear that devolution laws enacted immediately after passage of the CoK indeed reflected the spirit of the Constitution on devolution. Unfortunately land laws and related service laws are yet to be totally aligned with the CoK. Indeed the role of CGs is relegated to peripheral functions of rating and partly planning. Roles such as adjudication, survey registration and governance of land transactions remains the remit of the NG. This has implications for other sectors such as agriculture, natural resource management and general access to, control over and management of land related resources in the Counties. The NG, by omission or commission, has been trying to re centralize land functions from the CGs and the NLC. This is more evident in the Land Laws Amendment Act, 2016 and the Physical Planning Bill, 2017.

The CGs should be assisted to define their county specific land questions and define county land policies to address those questions. There are counties outside the ten that were identified for the audit that have addressed their mandates on land in a robust way as suggested here. These include Kajiado, which has a Land policy and Kericho, which has a Survey Act. Makueni has also begun a consultative process to collect views to facilitate the crafting of a land policy and law for the county. These experiences can inform the process of defining and dealing with land in the counties. CGs should also be assisted to prepare county specific land use policies to guide the county physical planning process.

6

TRADE AND INVESTMENT

6.1 Introduction

The trade and investment sector cuts across areas of economic and business activity such as industry and investment, cooperatives, trade, EAC integration, and tourism.⁶¹ Sectors such as industry and investment contribute about an annual average of 10 percent of the country's GDP.⁶² Most of these areas are shared, in varying degrees, with the county governments. The county governments are in charge of areas such as regulation of markets for local trade, trade licencing, fair trading practices, local tourism, and cooperative societies. It is expected that laws and policies would be aligned to ensure respect to and adherence to the functional boundaries that have been established between the two levels of government.

The audit of the trade and investments sector entailed a review of 32 pieces of national legislature in order to ascertain the extent of alignment with the constitutional framework. The previous legal and policy audit of legislation in 2015 entailed a review of Value Added Tax, Consumer Protection Act, Scrap Metal Bill, County Industrial Bill and Policy Framework for Regulation of Corporative Societies. In the report, recommendations were made for the alignment of the laws with national legislation.

Despite this, there still exists laws and policies that essentially recentralize this function back to the National Government. This phenomenon manifests itself through regional development authorities, state corporations and other national institutions, which continue to perform functions that belong to county governments. The effect of this has been that devolved functions are under-funded, there is wastage of resources and overlaps/duplication of roles. To cure this, comprehensive legal and policy reforms are required including the Trade and Investment sector to achieve alignment with the devolved system of governance.

6.2 National Legislation

A total of 32 National Acts. In general it was found that the majority of the legislation for the Trade and Investment Sector do not cater for county government representation in their Board and Committee structures and key decision making positions yet the legislation cover important trade and investment issues affecting counties. This was particularly so with regard to the Special Economic Zones Act, 2015; Export Processing Zones Act, Cap. 517; Micro and Small Enterprise Act No. 55 of 2012; and the Public Private Partnership Act, Cap. No. 5 of 2013). The National Legislation touching on the County functions does not also allow for consultation with the respective county. Only the Micro and Small Enterprise Act No. 55 of 2012 is currently under review to address county government functions. It was found that some key institutions are established only under legal notices and required legislative review.

61 Republic of Kenya, National Treasury 'Report for the General Economic and Commercial Affairs' (GECA) Sector (September 2016) P. 141.

62 As above.

Table 15: Audit of the National and County Legislation for Trade and Investment Sector for conformity with the Constitution 2010

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
The Investment Promotion Act, No. 6 of 2004	<p>The Act generally: considers the national Government and functions of the Kenya Investment Authority established under this ACT.</p> <p>Sec. 30 Gives the Cabinet Secretary powers to make regulations generally for this ACT including amending the Second Schedule.</p>	<p>There is need to provide for a uniform formulation of this legislation to guide both levels of Government.</p> <p>The review of this Act to ensure the mandatory public participation of stakeholders at the national and county levels.</p>	<p>Section 30(1): The Minister in consultation with the Board may make regulations generally for the better carrying out of the provisions of this Act.</p>
Export Processing Zones Act, No. 16 of 2015	<p>Section 3: Establishment and membership of the Export Processing Zones Authority (EPZA).</p> <p>Section 10: Power of the Authority to make rules.</p> <p>Section 15: Declaration of export processing zone (1) Provides for the Minister to declare any area of Kenya be an EPZ on recommendation of the Authority and in consultation with the Minister for finance.</p> <p>Section 18: Power of Minister to make rules.</p> <p>Section 34: The Minister may make regulations in respect of any matter required by this Act to be prescribed or in respect of which regulations are authorized.</p>	<p>The EPZA Act requires a review to conform to the realities of the devolved system of governance. For instance the Constitution 2010 Fourth Schedule, Part 2 (7) provides for County Governments to be responsible for Trade regulation and Development.</p> <p>The Counties should propose areas to be declared export processing zones.</p> <p>Mandatory public participation in making rules and regulations.</p>	<p>Section 3: Membership of the EPZA Board should ensure County Government representation.</p> <p>Section 10: Power of the Authority to make rules with public participation.</p> <p>Section 15(1): The Minister may, on recommendation of the, County Government, the Authority and in consultation with the Minister for the time being responsible for finance with the object of attracting, promoting or increasing the manufacture of goods, or provision of services, for export, by gazette, declare any area of Kenya to be an export processing zone.</p> <p>Section 18: Power of the Minister to make rules (in consultation with the Board and the County Government).</p> <p>Section 34: The Minister in consultation with the Board may make regulations in respect of any matter required by this Act to be prescribed or in respect of which regulations are authorized.</p>

Table 15: Audit of the National and County Legislation for Trade and Investment Sector for conformity with the Constitution 2010 (Cont'd)

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
Foreign Investment Protection Act, Cap. 518	Section 9: Regulations and directions by the Minister	Public participation mandatory including the relevant County Government.	Section 9: The Minister in consultation with the relevant County Government may make regulations or give directions generally for the better carrying out of this Act and prescribing the manner in which applications shall be made for certificates under this Act, and the information which shall accompany those applications.
The Micro and Small Enterprises Act No. 55 of 2012	The Micro and Small Enterprise Authority to be seen to advise at both levels of Governments.	The main object of the Bill is to amend the definition of the term 'micro and small enterprises' to include informal sector, introduce a new subsection under section 31 and amend section 47 to provide that the Authority shall advise and facilitate relevant National Government Ministries and County Government Departments.	Micro and Small Enterprises (Amendment) Bill, (Senate Bill No. 12 of 2015) <ul style="list-style-type: none"> ●Amendment of section 2 of No. 55 of 2012. ●Amendment of section 31 of no. 55 of 2012. ●Amendment of section 47 of No. 55 of 2012.
Scrap Metal Act No. 1 of 2015	Has not been implemented despite the fact it was enacted in 2015.	The Scrap Metal Council to be established in 2018 by Ministry of Industry and Trade.	Representation of County government is recommended.
County Industrial Development Bill, 2014	Was to be introduced to the Senate in 2014	Requires follow up with the Ministry of Industry, Trade and Cooperatives.	The Act expected to reflect the central role of counties in driving industrialization.
Investment Disputes Convention Act, Cap. 522	Representation of the County Governments at the Administrative Council and Secretariat of the International Centre for Settlement of Investment Disputes,	Chapter I, Section 2 – The Administrative Council: The country representative to consult the County governments during making of administrative and financial regulations of the International Centre for Settlement of Investment disputes.	The Administrative Council to have representation from the National and County governments.

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
Nairobi Centre for International Arbitration Act, No. 26 of 2013	The constitution of the Board of Directors of the Nairobi Centre for International Arbitration is not inclusive.	County Government representation required.	Section 6. Board of Directors should include representation for the Council of Governors. Section 25: Should provide for the Board making rules in consultation with the Minister.
The Companies Act, 2015	No none-compliance noted. The Act was reviewed recently with good public participation.	None	None
Special Economic Zones Act, No. 16 of 2015	Section 4: Declaration of Special Economic Zones by the Cabinet Secretary.	Proposal for the establishment of Special Economic Zones should be from the Counties to the Cabinet Secretary for approval. The County Government should be involved in the management of the Special Economic Zones.	Section 4: Declaration of special economic zones should provide for participation of the Counties. Section 12: Board of Directors of the Authority should be inclusive of both levels of governance. Section 16(1): There shall be a chief Executive Officer of the Authority who shall be appointed competitively by the Board in consultation with the Minister.
Value Added Tax Act, Cap. 476	Section 7 (1): The Minister may amend schedules Section 58: The Minister may make regulations for the better carrying out or giving effect to the purposes and provisions of this Act, Section 59(2): Without prejudice to any provision under this Act, the Minister may make regulations prescribing conditions for any person authorized to act as an agent under this section.	Public participation to ensure harmony in implementation at the County level and National level. The tax structure was pointed out by stakeholders to be friendly to the national government as opposed to the county governments.	Section 7 (1): The Minister in consultation with the Board may by order published in the Gazette- (a) amend the First Schedule by increasing any of the rates of tax by an amount not exceeding twenty-five per cent of the rate set out therein; (b) amend, vary or replace the Sixth and Seventh Schedules. Section 58: The Minister in consultation with the Board may make regulations for the better carrying out or giving

Table 15: Audit of the National and County Legislation for Trade and Investment Sector for conformity with the Constitution 2010 (Cont'd)

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
			<p>effect to the purposes and provisions of this Act,</p> <p>Section 59(2): Without prejudice to any provision under this Act, the</p> <p>Minister in consultation with the Board may make regulations prescribing conditions for any person authorized to act as an agent under this section.</p>
<p>Income Tax Act, Cap. 470</p>	<p>Section 6A(2): The Minister may, by notice in the Gazette , prescribe regulations for the better carrying out the provisions of this section.</p> <p>Section 12C(2): The Minister may, by notice in the Gazette , prescribe rules for the better carrying out of the provisions of this section.</p> <p>Section 82(7): The Minister may make rules-</p> <p>Section 83(7): The Minister may make rules-</p> <p>Section 130: The Minister may make rules prescribing anything that is to be prescribed under, and generally for carrying out the provisions of, this Act.</p>	<p>Public participation and in particular at the county level.</p> <p>Stakeholders to be involved in the process of making rules and regulations.</p>	<p>Section 6A(2): The Minister in consultation with the Commissioner may, by notice in the Kenya Gazette , prescribe regulations for the better carrying out the provisions of this section.</p> <p>Section 12C(2): The Minister in consultation with the Commissioner may, by notice in the Gazette , prescribe rules for the better carrying out of the provisions of this section.</p> <p>Section 82(7): The Minister in consultation with the Commissioner may make rules-</p> <p>Section 83(7): The Minister in consultation with the Commissioner may make rules-</p> <p>Section 130: The Minister in consultation with the Commissioner may make rules prescribing anything which is to be prescribed under, and generally for carrying out the provisions of, this Act.</p>
<p>Prevention of Fraud (Investments) Act, No. 1 of 1977</p>	<p>Section 4: Establishment of New Issues Committee</p> <p>Section 9(1): Subject to the following provisions of this Part, the Minister upon</p>	<p>A review of Section 4 will provide for appropriate consideration of the issues at the County level.</p>	<p>Section 4: Establishment of the new Issues Committee by the Minister should provide for a representative from</p>

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
	<p>application in that behalf made by any person in the prescribed manner, and on payment of the prescribed fee, shall grant to that person a principal's license.</p> <p>Section 12: Refusal and revocation of licenses</p> <p>Section 25: Making of rules by the Director of Public Prosecutions.</p> <p>Section 28: The Minister may make regulations for prescribing anything which by this Act, other than Part VI, is required or authorized to be prescribed.</p>		<p>the County Government.</p> <p>Section 9 (1): Application for, and grant and extend of, licenses should provide for the Minister to consult with the County Government before grant of a principal's license.</p> <p>Section 12: Refusal and revocation of licenses should be with the recommendation of the New Issues Committee.</p> <p>Section 25: Making of rules by the Director of Public Prosecutions should provide for consultations with stakeholders.</p> <p>Section 28: The Minister may make regulations for prescribing anything which by this Act, other than Part VI, is required or authorized to be prescribed with public participation.</p>
<p>Intergovernmental Relations Act, 2012</p>	<p>Section 38(1): The Cabinet Secretary may, in consultation with the summit, make regulations for the better carrying out of the provisions of this Act.</p>	<p>In the spirit of cooperation between the national and county governments the Cabinet Secretary should make regulations in consultation with the Summit for effective county government participation.</p>	<p>Section 38(1): The Cabinet Secretary may, in consultation with the Chairman of the COG, make regulations for the better carrying out of the provisions of this Act.</p>
<p>Treaty Making and Ratification of Treaties Act, No. 45 of 2012</p>	<p>Section 5(1): Subject to the provisions of this section, the relevant national executive or the relevant State department shall initiate the treaty making process in such manner as may be prescribed by the Cabinet Secretary.</p>	<p>Treaty making and ratification requires advice from the Attorney General's office.</p>	<p>Section 5(1): Subject to the provisions of this section, the relevant national executive or the relevant State department shall initiate the treaty making process in such manner as may be prescribed by the Cabinet Secretary in consultation with the Attorney General.</p>

Table 15: Audit of the National and County Legislation for Trade and Investment Sector for conformity with the Constitution 2010 (Cont'd)

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
<p>The Competition Act, 2010</p>	<p>Section 10: Members of the Competition Authority.</p> <p>Section 60 (2) : Product information standards: The Authority may, by regulations in respect of goods of a particular kind, prescribe a consumer product information standard consisting of such requirements as to-</p> <p>Section 71(5): The members of the Tribunal shall be entitled to receive such fees and allowances as the Minister may determine.</p>	<p>Appointment of the members of the Authority to include members from the County Government.</p> <p>Stakeholder participation in making standards and regulations for the standards.</p>	<p>Section 10 (1f): five other members to be appointed by the Minister in consultation with the County Government from among persons experienced in completion and consumer welfare matters, one of whom shall be experienced in consumer welfare matters.</p> <p>Section 60(2): The Authority may, by regulations in consultation with consumer stakeholders in respect of goods of a particular kind, prescribe a consumer product information standard consisting of such requirements as to-</p> <p>Section 71(5): The members of the Tribunal shall be entitled to receive such fees and allowances as the Minister may in consultation with SCAC determine.</p>
<p>East African Community Customs Management Act, 2004</p>	<p>Section 12(1): The Commissioner may by notice in the Gazette, appoint – (Appointment of Customs areas).</p>	<p>Depending on the location, the counties could make recommendations on areas to be appointed as Customs areas.</p>	<p>Section 12(1): The Commissioner may in consultation with stakeholders by notice in the Gazette, appoint – (Appointment of Customs areas).</p>
<p>Employment Act, Cap. 226</p>	<p>Labour Advisory Board Section 3(2): The members of the Board shall be appointed by the Minister, and the Minister shall appoint a member to be chairman thereof and shall appoint an officer of the Labour Department to be secretary thereof.</p>	<p>The County Governments should be represented on the Labour Advisory Board.</p>	<p>Section 3(2): The members of the Board shall be appointed by the Minister in consultation with the County Government and the Minister shall appoint a member to be chairman thereof and shall appoint an officer of the Labour Department to be secretary thereof.</p>

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
Sacco Societies Act, 2008 (Cap. 490)	<p>Section 10: Remuneration of the Board members: The Authority, in consultation with the Minister, shall pay members of the Board.</p> <p>Section 57(1): The Board of Trustees shall pay its members such remuneration or allowances for expenses out of the Deposit Guarantee Fund as it may determine after consultation with the Minister.</p>	<p>Need to harmonize salaries and allowances in the public service as per the SCAC guidelines.</p> <p>Need to harmonize salaries and allowances in the public service as per the SCAC guidelines.</p>	<p>Section 10: The Authority, in consultation with the Minister and the State Corporation Advisory Committee (SCAC), shall pay members of the Board such remuneration or allowances for their services and expenses as it may determine.</p> <p>Section 57(1): The Board of Trustees shall pay its members such remuneration or allowances for expenses out of the Deposit Guarantee Fund as it may determine after consultation with the Minister, State Corporation Advisory Committee and the Salaries Commission.</p>
Insurance Act, 2015 (Cap. 487)	<p>Section 3D: The Authority, in consultation with the Minister, shall pay the members of the Board such allowances for expenses as it may determine.</p> <p>Section 169(6): The Minister may make rules-</p>	<p>Need to harmonize salaries and allowances in the public service as per the SCAC guidelines.</p> <p>Making rules for the purpose of hearing appeals by the Tribunal with public participation.</p>	<p>Section 3D: The Authority, in consultation with the Minister, State Corporations Advisory Committee and the Salaries Commission shall pay the members of the Board such allowances for expenses as it may determine.</p> <p>Section 169(6): The Minister in consultation with the Board may make rules-</p>
Public Procurement and Asset Disposal Act, No. 33 of 2015	Section 28 (2): The Review Board shall have powers to develop rules and procedures to be gazette by the Cabinet Secretary.	The Review Board to consult appropriately.	Section 28 (2): The Review Board shall have powers to develop rules and procedures in consultation with stakeholders and be gazette by the Cabinet Secretary.
Industrial property Act, 2001	Section 117: The Minister may make rules regulating the practice and procedure of the Tribunal.	Stakeholder participation in the development of rules and procedures.	Section 117: The Minister may make rules regulating the practice and procedure of the

Table 15: Audit of the National and County Legislation for Trade and Investment Sector for conformity with the Constitution 2010 (Cont'd)

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
	<p>Section 119: The Minister may make regulations prescribing anything which under this Act may be prescribed and generally for the better carrying out of the objects and purposes of this Act.</p>	Stakeholder participation in the development of rules and procedures.	<p>Tribunal in consultation with the Board of Directors of the Kenya Industrial Property Institute (KIPI)</p> <p>Section 119: The Minister may make regulations prescribing anything which under this Act may be prescribed and generally for the better carrying out of the objects and purposes of this Act in consultation with the Board of Directors of KIPI.</p>
Trade Marks Act, Cap. 506	<p>Section 39 (1): The Minister may from time to time make such rules, prepare such forms and generally do such things as he thinks expedient, for empowering the Registrar to amend the register, whether by making or expunging or varying entries therein, so far as may be requisite for the purpose of adapting the designation therein of the goods or classes of goods or services or classes of services in respect of which trademarks are registered to any amended or substituted classification that may be prescribed.</p> <p>Section 36A (2): The Minister may make rules for the surrender of a registered trade mark and for protecting persons with rights in the registered trade mark.</p> <p>Section 40C(1): The Minister may, in rules, make appropriate provisions to give effect, in Kenya, to the provisions of the Banjul Protocol and the Madrid Agreement and the Madrid Protocol.</p>	<p>Stakeholder participation</p> <p>Stakeholder participation</p> <p>Stakeholder participation</p>	<p>Section 39 (1): The Minister may from time to time in consultation with the Board make such rules, prepare such forms and generally do such things as he thinks expedient, for empowering the Registrar to amend the register, whether by making or expunging or varying entries therein, so far as may be requisite for the purpose of adapting the designation therein of the goods or classes of goods or services or classes of services in respect of which trademarks are registered to any amendment or substituted classification that may be prescribed.</p> <p>Section 36A (2): The Minister in consultation with the Board may make rules for the surrender of a registered trade mark and for protecting persons with rights in the registered trade mark.</p> <p>Section 40C(1): The Minister in consultation with the Board may,</p>

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
	<p>Section 41: Power to make rules;</p> <p>The Minister may make such rules, prescribe such forms and generally do such things as he thinks expedient-</p>	Stakeholder participation	<p>in rules, make appropriate provisions to give effect, in Kenya, to the provisions of the Banjul Protocol and the Madrid Agreement and the Madrid Protocol.</p> <p>Section 41: The Minister in consultation with the Board may make such rules, prescribe such forms and generally do such things as he thinks expedient-</p>
The Standards Act, Cap. 496	<p>Section 16B: The Minister shall pay the members of the Tribunal such remuneration and allowances as the Minister determines.</p> <p>Section 16H (1): The Minister may make rules for regulating the practice and procedure of the Tribunal.</p>	<p>Harmonize salaries and allowances in the public service.</p> <p>Stakeholder participation</p>	<p>Section 16B: The Minister shall pay the members of the Tribunal such remuneration and allowances as per the laid out national guidelines.</p> <p>Section 16H (1): The Minister may make rules in consultation with the Council for regulating the practice and procedure of the Tribunal.</p>
States Corporations Act Cap 446: Legal Notice No. 55 of May 2009 (KENAS as the sole National Accreditation Body)	Kenya Accreditation Service (KENAS) is the sole national accreditation body mandated to offer accreditation services in Kenya.	A legal Notice is not appropriate for establishment of such an important institution.	KENAS should be a State Corporation established by an Act of parliament.
Science, Technology and Innovation Act No. 28 of 2013 (Kenya Industrial Research and development Institute as the National Industrial, Technology and Innovation Institute)	Section 45 (1): The Cabinet Secretary may make Regulations for the better carrying out of the provisions of this Act.	Stakeholder participation	Section 45 (1): The Cabinet Secretary in consultation with the Commission may make Regulations for the better carrying out of the provisions of this Act.

Table 15: Audit of the National and County Legislation for Trade and Investment Sector for conformity with the Constitution 2010 (Cont'd)

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
<p>Privatization Act No. 2 of 2005</p>	<p>Section 42(2): The Minister may make regulations governing the records required under subsection (1).</p> <p>Section 46(1): The members of the Tribunal shall be paid such allowances and expenses as are determined by the Minister.</p> <p>Section 51: The Minister may make regulations generally for the better carrying out of the provisions of this Act.</p>	<p>Stakeholder participation</p> <p>Need to harmonize salaries and allowances in the public service consistent with the SCAC guidelines</p> <p>The Constitutional requirement for stakeholder consultation.</p>	<p>Section 42(2): The Minister in consultation with the Commission may make regulations governing the records required under subsection (1).</p> <p>Section 46(2): The members of the Tribunal shall be paid such allowances and expenses as are determined by the Minister in consultation with the Commission.</p> <p>Section 51: The Minister in consultation with the Commission may make regulations generally for the better carrying out of the provisions of this Act.</p>
<p>Legal Notice No. 4342 of 19th August, 1992: The Export Promotion Council (EPC)</p>	<p>EPC Established through Legal Notice.</p>	<p>Export Promotion Council urgently requires its own Act of Parliament for more effective service provision.</p>	<p>EPC needs to be established under an Act of Parliament.</p>
<p>Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301</p>	<p>Section 11(2): Persons other than public officers appointed under the provisions of subsection (1) of this section shall be paid such emoluments or allowances as the Minister shall determine.</p> <p>Section 16(1): The Minister may make regulations for the better carrying out of the provisions of this Act and without prejudice to the generality of the foregoing such regulations may prescribe-</p>	<p>Need to harmonize allowances across government institutions.</p> <p>Stakeholder participation</p>	<p>Section 11(2): Persons other than public officers appointed under the provisions of subsection (1) of this section shall be paid such emoluments or allowances as the Minister shall determine in consultation with SCAC.</p> <p>Section 16(1): The Minister in consultation with the Tribunal may make regulations for the better carrying out of the provisions of this Act and without prejudice to the generality of the foregoing such regulations may prescribe-</p>

Name of Act	Issue	Rational for proposal for Amendment	Proposal for Amendment
The Anti-Counterfeit Act, 2008	<p>Section 37(1): The Minister may make regulations generally for the better carrying into effect the provisions of this Act.</p> <p>Section 37(2): Without prejudice to the generality of the fore going, the Minister may in such regulations prescribe-</p>	Stakeholder participation	<p>Section 37: The Minister may in consultation with the Board make regulations generally for the better carrying into effect the provisions of this Act.</p> <p>Section 37(2): Without prejudice to the generality of the fore going, the Minister in consultation with the Board may in such regulations prescribe-</p>
The Tourism Act (No. 28 of 2011) Tourism Fund Regulations, 2015	Local tourism is governed by counties and yet at the moment under the Fourth Schedule of the Constitution it is a function of the national government?	Stakeholder participants raised this concern pointing to the need of an Inter-governmental technical committees to assist in streamlining agreements at the two levels of governments.	Creation of Intergovernmental technical committees.

6.3 National Policies

Two National policies were audited for conformity to the Constitution 2010. These are: the Draft National Co-operative Development Policy, 2017 and the National Trade Policy, 2016 (Transforming Kenya into a Competitive Export-led and Efficient Domestic Economy). The Trade Policy was found to conform to the Constitution 2010 and was consistent to the expected to Trade as a County function. However, the National Co-operative Development Policy was still in draft form and yet to have stakeholder input. One missing element from the latter policy is the need for measures aimed at capacity building at the county level and technical assistance to align the county policies to the national policy.

Table 16: Audit of two National Policies in the Trade and Investment Sector for conformity with the Constitution 2010

Name of Policy	Issue	Rational for proposal for Amendment	Proposal for Amendment
1. National Trade Policy, 2016 (Transforming Kenya into a Competitive Export-led and Efficient Domestic Economy)	Lack of a coherent framework for coordination of the formulation and implementation of trade policy	The New Trade Policy has adequately addressed the previous state of Trade policies scattered in diverse governments and regulations with lack of harmonization and coordination mechanisms.	No amendment required to the new National Trade Policy, 2016.
2. National Co-operative Development Policy, 2017 (Draft)	Policy recognizes critical role played by the County governments as key centres of development by which economic growth can be relied through creation of synergies with the National Government and other agencies.	Counties need technical assistance to align their policies to the national policy. More stakeholder consultation has been requested.	The policy to address the Capacity building need at the counties.

6.4 County Legislation

A total of 13 pieces of county legislation were reviewed. Not many counties have passed laws dealing with trade and investment. This informed the recommendation that the national government needs to develop a capacity development strategy for county governments in the development of national laws and policies for county governments. The table below captures the analysis from the county legislation examined.

Table 17: Audit of the County Legislation for Trade and Investment Sector for conformity with the Constitution 2010

<p>The Nyeri Tax waivers Administration Act, 2014</p>	<p>Section 5(1): The Executive Committee Member responsible for Finance may, where he or she deems it appropriate, waive or vary, the payment of any tax, fees, or other payment due to the County Government.</p> <p>Section 10(1): The Executive Committee Member may make Regulations for the better carrying out of the provisions of this Act.</p>	<p>There should be a provision for the Executive Committee member to waive or vary payment of any tax in consultation with the Executive Committee to be in line with Article 10 (2c) for transparency, integrity and good governance.</p> <p>Stakeholder participation in making rules.</p>	<p>Section 5(1): The Executive Committee Member responsible for Finance in consultation with the Executive Committee may, where he or she deems it appropriate, waive or vary, the payment of any tax, fees, or other payment due to the County Government.</p> <p>Section 10(1): The Executive Committee Member in consultation with the Executive Committee may make Regulations for the better carrying out of the provisions of this Act.</p>
<p>The Nyeri County Enterprise Development Fund Act, 2017</p>	<p>Section 40 (1): The County Executive Member may make regulations generally for the better carrying out of the provisions and purposes of this Act.</p> <p>Section 40 (3): Notwithstanding the provisions of subsection (1) and (2), the County Executive Committee member for the time being responsible for trade may make regulations in relation to enterprise development and any administrative guidelines for the better carrying out of the provisions and purposes of this Act.</p>	<p>The Constitutional requirement for stakeholder consultation.</p>	<p>Section 40: The County Executive Member in consultation with the Board may make regulations generally for the better carrying out of the provisions and purposes of this Act.</p> <p>Section 40 (3): Notwithstanding the provisions of subsection (1) and (2), the County Executive Committee member for the time being responsible for trade in consultation with the Board may make regulations in relation to enterprise development and any administrative guidelines for the better carrying out of the provisions and purposes of this Act.</p>
<p>The Nyeri County Investment Development Corporation Act, 2016</p>	<p>Section 9: The remuneration of the members of the Board shall be as determined by the County Treasury in consultation with the County Public service Board and must attract the right caliber of personnel.</p>	<p>There in need to harmonize salaries and allowances in the public service.</p>	<p>Section 9: The remuneration of the members of the Board shall be as determined by the County Treasury in consultation with the County Public service Board and SCAC and must attract the right caliber of personnel.</p>
<p>The Nyeri County Enterprise Fund Act, 2017</p>	<p>Section 14(3): The Executive Member may make regulations for the realization of the powers granted in Section 14(1)</p>	<p>Need for the Executive Member to consult with the Board while making regulations.</p>	<p>Section 14(3): The Executive Member in consultation with the Board may make regulations for the realization</p>

Table 17: Audit of the County Legislation for Trade and Investment Sector for conformity with the Constitution 2010

			of the powers granted in Section 14(1)
The Kisumu County Trade Fund Act, 2015	Section 22: The Executive Committee member may make regulations generally for the better carrying out of the provisions of this Act and without prejudice to the foregoing, the Executive Committee Member may make regulations in respect of the following – 22 (a), (b), (c), (d) and (e).	The Constitutional requirement for stakeholder consultation.	Section 22: The Executive Committee member in consultation with the Board may make regulations generally for the better carrying out of the provisions of this Act and without prejudice to the foregoing, the Executive Committee Member may in consultation with the Board make regulations in respect of the following - 22 (a), (b), (c), (d) and (e).
Kisumu County Co-operative Act, 2015 No. 5 of 2015	Section 78(1): The Member of the Executive Committee may make regulations for the better carrying out of the provisions of this Act,	There is need to provide for consultation.	Section 78(1): The Member of the Executive Committee in consultation with the Commissioner may make regulations for the better carrying out of the provisions of this Act,
Kisii County Business Licensing Act, 2015	Section 22(1): The County Executive Member may, make regulations for the proper and efficient administration of this Act.	Stakeholder participation	Section 22(1): The County Executive Member in consultation with the County Secretary may, make regulations for the proper and efficient administration of the Act.
Kisii County Outdoor Advertising Act, 2014	Section 17. The County Executive Member, may make regulations-	Stakeholder participation	Section 17. The County Executive Member in liaison with the Committee on Public participation may make regulations-
Kisii County Rating Act, 2015	Section 19(1): The County executive member responsible for finance, may make regulations or rules generally for the better carrying out of the provisions and purposes of this Act, and different rules may be made in respect of different forms of rating areas.	Stakeholder participation	Section 19(1): The County executive member responsible for finance in consultation with the County Assembly , may make regulations or rules generally for the better carrying out of the provisions and purposes of this Act, and different rules may be made in respect of different forms of rating areas.
Kisii County Trade and Markets Act, 2015	Section 40. The County Executive Committee member may make regulations-	Stakeholder participation	Section 40. The County Executive Committee member in consultation with the Directorate may make regulations-

	It was observed that professionals carry out functions within a county (under the Trades Markets Act), treated as traders and subjected to separate license fees by the county government apart from the license professional fees charged by the national government?	This needs to be reviewed to give a clear definition of a 'trader'.	Review definition of a trader and professionals qualifying for a single business permit.
Nairobi City County Alcoholic Drinks Control and licensing Act, 2014	Section 55: The Executive Committee Member may, with the written approval of the Governor, make regulations for the better carrying out of the provisions of this Act.	The Constitutional requirement for stakeholder consultation.	Section 55: The Executive Committee Member in consultation with the Board may, with the written approval of the Governor, make regulations for the better carrying out of the provisions of this Act.
The Nairobi County Tax waivers Administration Act, 2013	Section 10(1): The Executive Committee Member may, with the approval of the Governor make regulations or the better carrying out of this Act.	Stakeholder participation	Section 10(1): The Executive Committee Member may, with the approval of the Governor and in consultation with the Executive Committee , make regulations or the better carrying out of this Act
The Nairobi County Betting, Lotteries and Gaming Act, 2014	Section 12: The Executive committee member may, with the approval of the Governor, make regulations or the better carrying out of this Act.	Stakeholder participation	Section 12: The Executive committee member in consultation with the Board may, with the written approval of the Governor, make regulations or the better carrying out of this Act.

7

URBAN DEVELOPMENT

7.1 Introduction

While the Constitution devolves powers to the 47 counties in a symmetric manner, it does not recognise the need for a separate framework for urban governance. In this regard, the Constitution provides that national legislation should provide for a separate framework of urban governance and this should entail: criteria for classifying urban areas into cities and other categories; principles of governance and management of urban areas; and provisions for public participation in urban governance.⁶⁸ Indeed, while the basic services are common throughout the country, the nature or process through which these services are provided differs from the concentrated urban population versus the sparsely populated and wide geographical areas in rural set ups.

Parliament passed the Urban Areas and Cities Act (UACA), which classifies urban areas into municipal, city and town status. Despite this, the general area of urban development requires an overhaul in order to align laws and policies to the constitutional provisions regarding urban governance. The expression “urban development” is used almost interchangeably with “urban planning”. They both refer to policies, laws and procedures as well as political processes, which promote responsible governance in the following areas inter alia:

- » Legitimate land tenure rights
- » Land use and planning
- » Transportation
- » The taxation of land value as the means towards optimal urban development
- » environmental sustainability issues
- » The planning and design of transportation and communication networks
- » public participation governance and inclusive leadership

The principles above are reiterated by the National Urban Development Policy, which indicates that the core principles for sustainable urban development include participatory urban planning, development and governance, equity in access to resources and opportunities, and efficiency in resource use and service provision. Other principles include: social, economic and environmental sustainability, inclusivity: cities and urban areas that cater for all segments of urban residents including marginalised and vulnerable groups, and good governance. Urban areas should also have and facilitate connectivity and synergy between county, national and global urban systems, and good quality infrastructure and services, and are secure, clean and green. The audit looked at policies, laws and procedures in the thematic areas set out above in three main themes:

- (a) Devolved Government;
- (b) Land and Environment; and
- (c) Public Finance.

⁶⁶ Article 184 (1).

7.2 Legislation and Policy on Urban Development

The 2010 Constitution contains institutional arrangements, principles, and provisions that require policy and legislative measures (both at the national and county governments) to ensure smooth implementation. Specifically, the Constitution requires a legal framework for separate urban governance, as well as laws and policies to facilitate the same.

There are a number of laws and policies that have been enacted or adopted (at national and county levels) and these provide a general basis for implementing urban development. The laws and policies are analysed in the table below.

Table 18: Matrix Audit for Urban Development Laws

Name of policy/law	Issue	Rationale/concern	Recommendation
<p>The National Land Policy (Sessional Paper No.3 of 2009)</p> <p>(National)</p>	<p>The Policy was developed before the promulgation of the Constitution.</p> <p>It therefore did not involve the input of the County Governments, which play a key constitutional role in land matters relating to County planning and development as per the Fourth Schedule to the Constitution.</p>	<p>The Policy should be reviewed to incorporate the provisions of the Constitution, particularly the Fourth Schedule on distribution of functions between the national and County Governments.</p>	<p>Revise the Policy in its entirety.</p>
	<p>Development control: Paragraph 51 of the Policy states that the Government shall:</p> <ul style="list-style-type: none"> i. Empower all planning authorities in the country to regulate the use of land taking into account the public interest; ii. Harmonize the institutional framework for development control to facilitate coordination; iii. Establish development control standards, processes and procedures; iv. Ensure effective enforcement of development control; and v. Ensure that the exercise of development control takes into account local practices and community values on land use and environmental management. <p>This contravenes the role of the County Governments in relation to County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Paragraph 51 should be reviewed to incorporate the role of the County Governments in relation to County planning and development as per Part 2 (8) of the Fourth Schedule to the Constitution.</p>	<p>Amend Paragraph 51 to state that the National Government shall, in consultation with the relevant County Governments exercise the development control functions.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>Land injustices Paragraph 61(e) of the Policy states that the Government shall establish mechanisms for the repossession of any public land acquired illegally or irregularly.</p> <p>This conflicts with the constitutional role of the National Land Commission (“the NLC”) in Article 67(2)(e) of the Constitution which gives the NLC the function of initiating investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommending appropriate redress.</p>	<p>Paragraph 61(e) should be reviewed to incorporate the role of the NLC in relation to investigating and addressing matters in relation to illegal or irregular acquisition of public land as per Article 67(2)(e) of the Constitution.</p>	<p>Revise Paragraph 61(e) to state that the NLC shall establish mechanisms for the repossession of any public land acquired illegally or irregularly.</p>
	<p>Leasehold Tenure Paragraph 80 of the Policy states that the Government shall, among other things:</p> <ul style="list-style-type: none"> i. Establish mechanisms for the creation of leasehold interests out of public, community and private land; and ii. Subject the renewal of all leases to general planning requirements. <p>This conflicts with the constitutional role of the NLC in Article 67(2)(a) and (h) of the Constitution which gives the NLC the functions of managing public land on behalf of the National Government and County Governments and to monitor and have oversight responsibilities over land use planning throughout the country.</p>	<p>Paragraph 80 should be reviewed to incorporate the role of the NLC in relation to management of public land on behalf of the National Government and County Governments and monitoring and having oversight responsibilities over land use planning throughout the country as per Article 67(2)(a) and (h) of the Constitution.</p> <p>It should also be reviewed to incorporate the role of County Governments in relation to public land under Article 62(2) of the Constitution and in relation to unregistered community land under Article 63(3) of the Constitution.</p>	<p>Revise Paragraph 80 to state that the National Government shall establish mechanisms for the creation of leasehold interests out of public, community and private land and subject the renewal of all leases to general planning requirements, in consultation with the NLC and the relevant County Governments.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>It also contravenes the role of County Governments in relation to public land under Article 62(2) of the Constitution and in relation to unregistered community land under Article 63(3) of the Constitution.</p>		
	<p>Allocation of public land Paragraph 84 of the Policy states that the Government shall, among other things:</p> <ul style="list-style-type: none"> i. Limit the amount of public land allocated to individuals or other entities depending on factors such as the intended use and the ecological zone; and ii. Eliminate incidents of multiple allocations and allocate land through public auctions except for land earmarked for the support of livelihoods in urban and rural areas. <p>This conflicts with the constitutional role of the NLC in Article 67(2)(a) and (h) of the Constitution which gives the NLC the functions of managing public land on behalf of the National Government and County Governments and to monitor and have oversight responsibilities over land use planning throughout the country.</p>	<p>Paragraph 84 should be reviewed to incorporate the supreme role of the NLC in relation to management of public land on behalf of the National Government and County Governments and monitoring and having oversight responsibilities over land use planning throughout the country as per Article 67(2)(a) and (h) of the Constitution.</p>	<p>Revise Paragraph 84 to state that the NLC shall:</p> <ul style="list-style-type: none"> i. Limit the amount of public land allocated to individuals or other entities depending on factors such as the intended use and the ecological zone; and ii. Eliminate incidents of multiple allocations and allocate land through public auctions except for land earmarked for the support of livelihoods in urban and rural areas.
	<p>Land Adjudication Paragraph 86 of the Policy states that the Government shall, among other things:</p> <ul style="list-style-type: none"> i. Complete the processes of adjudication and consolidation; and ii. Ensure that adjudication and consolidation processes are speedy, transparent and accountable. 	<p>Paragraph 86 should be reviewed to incorporate the role of the NLC in relation to land use planning as per Article 67(2)(h) of the Constitution.</p> <p>It should also be reviewed to incorporate the role of the County Governments in relation to County planning and</p>	<p>Revise Paragraph 86 to state that the National Government shall, in consultation with the NLC and the relevant County Governments:</p> <ul style="list-style-type: none"> i. Complete the processes of adjudication and consolidation; and ii. Ensure that adjudication and consolidation

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>This conflicts with the constitutional role of the NLC in Article 67(2)(h) of the Constitution which gives the NLC the function of monitoring and having oversight responsibilities over land use planning throughout the country.</p> <p>It also contravenes the role of the County Governments in relation to County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>development as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>processes are speedy, transparent and accountable.</p>
	<p>Land for investment Paragraph 94 of the Policy states that the Government shall, among other things:</p> <ul style="list-style-type: none"> i. Compulsorily acquire all land on which mineral resources have been discovered before allocating such land to interested investors to facilitate fast access to the land and to prevent the exploitation of local communities, environmental degradation and ensure restoration of land after exploitation; ii. Regulate the development of private resort cities and other major ventures to ensure they adhere to development planning and control and facilitate public access thereto; and iii. Acquire land for strategic public ventures such as sea ports, airports, and research facilities for purposes of security and planning and ensure that such land is accessible to auxiliary developers only through sub-leases. 	<p>Paragraph 94 should be reviewed to incorporate the role of the NLC in relation to managing public land on behalf of the National Government and County Governments and to monitor and have oversight responsibilities over land use planning throughout the country as per Article 67(2)(a) and (h) of the Constitution.</p> <p>It should also be reviewed to incorporate the role of the County Governments in relation to County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Revise Paragraph 94 to state that the National Government shall, in consultation with the NLC and the relevant County Governments shall:</p> <ul style="list-style-type: none"> i. Compulsorily acquire all land on which mineral resources have been discovered before allocating such land to interested investors to facilitate fast access to the land and to prevent the exploitation of local communities, environmental degradation and ensure restoration of land after exploitation; ii. Regulate the development of private resort cities and other major ventures to ensure they adhere to development planning and control and facilitate public access thereto; and

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>This conflicts with the constitutional role of the NLC in Article 67(2)(a) and (h) of the Constitution which gives the NLC the functions of managing public land on behalf of the National Government and County Governments and to monitor and have oversight responsibilities over land use planning throughout the country.</p> <p>It also contravenes the role of the County Governments in County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution.</p>		<p>iii. Acquire land for strategic public ventures such as sea ports, airports, and research facilities for purposes of security and planning and ensure that such land is accessible to auxiliary developers only through sub-leases.</p>
	<p>Land Use Management Paragraph 102 of the Policy states that the Government shall put in place appropriate strategies for managing sustainable growth and development of urban and rural areas.</p> <p>This contravenes the role of the County Governments in County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution. It also contravenes the mandate of the County Governments to manage urban areas as provided for in Section 12(1) of the Urban Areas and Cities Act, which was enacted to give effect to Article 184 of the Constitution.</p> <p>The Paragraph also contravenes Article 67(2)(h) of the Constitution which gives the NLC the mandate of monitoring and oversight responsibilities over land use planning throughout the country.</p>	<p>Paragraph 102 should be reviewed to incorporate the role of the County Governments in relation to County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution and the mandate of the NLC in relation to monitoring and oversight responsibilities over land use planning throughout the country as per Article 67(2)(h) of the Constitution.</p> <p>It should also be reviewed to incorporate the mandate of the County Governments in relation to urban areas as provided for in the Urban Areas and Cities Act, which was enacted to give effect to Article 184 of the Constitution.</p>	<p>Revise Paragraph 102 to state that the County Governments shall, in consultation with the National Government and the NLC, put in place appropriate strategies for managing sustainable growth and development of urban and rural areas.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>Land Use Planning Paragraph 105 of the Policy states that the Government shall, among other things:</p> <ul style="list-style-type: none"> i. Develop a national land use policy as a basis for land use management; ii. Provide an appropriate framework for preparation and implementation of national, regional and local area land use plans and ensure that the planning process is integrated, participatory and meets stakeholder needs; and iii. Facilitate appropriate institutional and technical capacity building initiatives for accelerating plan implementation at national, regional and local levels. <p>This conflicts with the constitutional role of the NLC in Article 67(2)(h) of the Constitution which gives the NLC the function of monitoring and oversight responsibilities over land use planning throughout the country.</p> <p>It also contravenes the role of the County Governments in County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Paragraph 105 should be reviewed to incorporate the role of the NLC of monitoring and oversight responsibilities over land use planning throughout the country as per Article 67(2)(h) of the Constitution and the role of the County Governments in County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Revise Paragraph 105 to state that the National Government shall, in partnership with the NLC and the relevant County Governments:</p> <ul style="list-style-type: none"> i. Develop a national land use policy as a basis for land use management; ii. Provide an appropriate framework for preparation and implementation of national, regional and local area land use plans and ensure that the planning process is integrated, participatory and meets stakeholder needs; and iii. Facilitate appropriate institutional and technical capacity building initiatives for accelerating plan implementation at national, regional and local levels.
	<p>National and Regional Planning Paragraph 106 of the Policy states that the Government shall, among other things:</p> <ul style="list-style-type: none"> i. Facilitate the development of national and regional physical development plans as a basis for investment and sustainable utilization of natural resources, taking 	<p>Paragraph 106 should be reviewed to incorporate the role of the NLC in relation to monitoring and oversight responsibilities over land use planning throughout the country as per Article 67(2)(h) of the Constitution and the role of the County Governments in County planning and</p>	<p>Revise Paragraph 106 to state that the National Government and the relevant County Governments shall, in consultation with the NLC:</p> <ul style="list-style-type: none"> i. Facilitate the development of national and regional physical development plans as a basis for

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>local land use practices into account; and</p> <p>ii. Provide for implementation of cluster settlements for easier provision of infrastructure and to stop uncontrolled subdivision of land.</p> <p>This conflicts with the constitutional role of the NLC in Article 67(2)(h) of the Constitution which gives the NLC the function of monitoring and oversight responsibilities over land use planning throughout the country.</p> <p>It also contravenes the role of the County Governments in County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>development as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>investment and sustainable utilization of natural resources, taking local land use practices into account; and</p> <p>ii. Provide for implementation of cluster settlements for easier provision of infrastructure and to stop uncontrolled subdivision of land.</p>
	<p>Rural Land Use Planning</p> <p>Paragraph 107 of the Policy states that the Government shall, among other things:</p> <p>i. Provide for rural land use strategies to assist communities achieve optimum productivity; and</p> <p>ii. Make rural land use planning an integral part of land adjudication process.</p> <p>There is no definition of “<i>rural land</i>” in the Constitution. However, it typically refers to land that is not within an urban centre and which is not developed. Article 62(2) and (3) of the Constitution set out the categories of public land which are vested in and held by the County Governments and the National Government respectively. Rural land may fall under the jurisdiction of both the National Government and the County Governments.</p>	<p>Paragraph 107 should be reviewed to incorporate the role of the NLC in relation to monitoring and oversight responsibilities over land use planning throughout the country as per Article 67(2)(h) of the Constitution and the role of the County Governments in County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution, specifically in relation to rural areas.</p>	<p>Revise Paragraph 107 to state that the National Government and the relevant County Governments shall, in consultation with the NLC:</p> <p>i. Provide for rural land use strategies to assist communities achieve optimum productivity; and</p> <p>ii. Make rural land use planning an integral part of land adjudication process.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>Paragraph 107 of the Policy does not adequately provide for the role of the County Governments in relation to County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution, and specifically in relation to rural areas.</p> <p>The Paragraph also conflicts with the constitutional role of the NLC in Article 67(2)(h) of the Constitution which gives the NLC the function of having monitoring and oversight responsibilities over land use planning throughout the country.</p>		
	<p>Urban and Peri-Urban Land Use Planning</p> <p>Paragraph 109 of the Policy states that the Government shall:</p> <ul style="list-style-type: none"> i. Facilitate the preparation and implementation of local area development plans for all urban and peri-urban areas in the country in a participatory manner; ii. Establish an effective coordinating mechanism for the preparation, implementation of plans and development control; and iii. Encourage development of underutilized land within urban areas. <p>This conflicts with the constitutional role of the NLC in Article 67(2)(h) of the Constitution which gives the NLC the function of monitoring and oversight responsibilities over land use planning throughout the country.</p>	<p>Paragraph 109 should be reviewed to incorporate the role of the NLC in relation to monitoring and oversight responsibilities over land use planning throughout the country as per Article 67(2)(h) of the Constitution and the role of the County Governments in relation to the management of urban areas and County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Revise Paragraph 109 to state that the County Governments shall, in consultation with the NLC:</p> <ul style="list-style-type: none"> i. Facilitate the preparation and implementation of local area development plans for all urban and peri-urban areas in the country in a participatory manner; ii. Establish an effective coordinating mechanism for the preparation, implementation of plans and development control; and iii. Encourage development of underutilized land within urban areas.

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>It also contravenes the mandate of the County Governments to manage urban areas as provided for in Section 12(1) of the Urban Areas and Cities Act, which was enacted to give effect to Article 184 of the Constitution and their role in County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution.</p>		
	<p>Regulating Use and Development of Land Paragraph 117 of the Policy states that the Government shall, among other things:</p> <ol style="list-style-type: none"> i. Review planning and development control legislation to harmonize the governance structures, decision-making processes, planning standards and regulations; and ii. Provide a coordinated framework for enforcing planning decisions. <p>This conflicts with the constitutional role of the NLC in Article 67(2)(h) of the Constitution which gives the NLC the function of monitoring and oversight responsibilities over land use planning throughout the country.</p> <p>It also contravenes the role of the County Governments in relation to County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Paragraph 117 should be reviewed to incorporate the role of the NLC relating to monitoring and oversight responsibilities over land use planning throughout the country as per Article 67(2)(h) of the Constitution and the role of the County Governments in County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Revise Paragraph 117 to state that the National Government shall, in consultation with the NLC and the relevant County Governments:</p> <ol style="list-style-type: none"> i. Review planning and development control legislation to harmonize the governance structures, decision-making processes, planning standards and regulations; and ii. Provide a coordinated framework for enforcing planning decisions.
	<p>Restoration and Conservation of Land Quality Paragraph 124 of the Policy states that the Government shall introduce incentives to encourage the use of technology and scientific methods for soil conservation.</p>	<p>Paragraph 124 should be reviewed to incorporate the role of the County Governments in implementation of specific National Government policies on natural resources and</p>	<p>Revise Paragraph 124 to state that the National Government shall introduce incentives to encourage the use of technology and scientific methods for soil conservation in</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>This conflicts with the role of the County Governments in implementation of specific National Government policies on natural resources and environmental conservation, including soil conservation, as per Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>environmental conservation, including soil conservation as per Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>consultation with the relevant County Governments.</p>
	<p>Land Surveying and Mapping Paragraph 155 of the Policy states that the Government shall, among other things, improve mapping standards in general boundary areas so that they fit into a computerized system.</p> <p>This conflicts with the constitutional role of the NLC in Article 67(2)(h) of the Constitution which gives the NLC the function of monitoring and oversight responsibilities over land use planning throughout the country.</p> <p>It also conflicts with the role of the County Governments in land survey and mapping as part of County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Paragraph 155 should be reviewed to incorporate the role of the County Governments in land survey and mapping as part of County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution.</p> <p>It should also be reviewed to incorporate the constitutional role of the NLC in Article 67(2)(h) of the Constitution which gives the NLC the function of monitoring and oversight responsibilities over land use planning throughout the country.</p>	<p>Revise Paragraph 155 to state that the National Government shall, in consultation with the relevant County Governments and the NLC, improve mapping standards in general boundary areas so that they fit into a computerized system.</p>
	<p>Resolution of Historical Land Injustices Paragraph 179 of the Policy states that the Government shall, among other things, establish a suitable legal and administrative framework to investigate, document and determine historical land injustices and recommend mechanisms for their resolution.</p>	<p>Paragraph 179 should be reviewed to incorporate the role of the NLC in initiating investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommending the appropriate redress as per Article 67(2)(e) of the Constitution.</p>	<p>Revise Paragraph 179 to state that the NLC shall establish a suitable legal and administrative framework to investigate, document and determine historical land injustices and recommend mechanisms for their resolution.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>This conflicts with the role of the NLC in Article 67(2)(e) of the Constitution which gives the NLC the function of initiating investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommending the appropriate redress.</p>		
	<p>Disaster Management Paragraph 201 of the Policy states that the Government shall, among other things:</p> <ul style="list-style-type: none"> i. Establish legal, policy and institutional frameworks for the prevention and management of land-related disasters; and ii. Establish a suitable legal and administrative framework for resettlement in the event of natural disasters. <p>Disaster management is a concurrent role of the National Government under Part 1(24) of the Fourth Schedule to the Constitution and the County Governments under Part 2(12) of the Fourth Schedule to the Constitution.</p>	<p>Paragraph 201 should be reviewed to incorporate the role of the County Governments in disaster management as per Part 2(12) of the Fourth Schedule to the Constitution.</p>	<p>Revise Paragraph 201 to state that the National Government shall, in partnership with the relevant County Governments:</p> <ul style="list-style-type: none"> i. Establish legal, policy and institutional frameworks for the prevention and management of land-related disasters; and ii. Establish a suitable legal and administrative framework for resettlement in the event of natural disasters.
	<p>District Land Boards (DLBs) Paragraphs 231 and 241-246 of the Policy state that the Government shall set up District Land Boards (DLBs), to act as agents of the NLC at the district level and that they shall be accountable to the NLC in the performance of their functions.</p> <p>The are no districts under the Constitution.</p>	<p>Paragraph 231 should be reviewed to incorporate the devolved system of government under the Constitution.</p>	<p>Revise the Policy to replace reference to DLBs with County Land Boards.</p>
	<p>Local Authorities Paragraphs 254 and 255 of the Policy provide for land use planning functions of local authorities.</p>	<p>Paragraphs 254 and 255 should be reviewed to incorporate the devolved system of government under the Constitution.</p>	<p>Revise the Policy to replace reference to local authorities with County Governments.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>The are no local authorities under the Constitution.</p>		
<p>The National Urban Development Policy, 2016 (National)</p>	<p>The Policy was developed to provide a framework for the management of urbanization and urban development of Kenya.</p> <p>It involved the input of the Council of Governors’ urban committee.</p>	<p>The Policy should be reviewed to incorporate the provisions of the Constitution, especially in relation to the role of the NLC under Article 67 of the Constitution.</p>	<p>Revise the Policy.</p>
	<p>Promoting Urban Industrial Development Paragraph 4.6 of the Policy makes the following recommendations, among others, with the County Governments as the lead agency for implementation:</p> <ul style="list-style-type: none"> i. Fast-tracking of regulatory reforms that promote transparent procedures for allocating industrial land to investors; ii. Prioritizing and securing of land for industrial development; and iii. Improving access to serviced land for industrial development. <p>This conflicts with the constitutional role of the NLC in Article 67(2)(h) of the Constitution which gives the NLC the function of monitoring and oversight responsibilities over land use planning throughout the country.</p>	<p>Paragraph 4.6 should be revised to incorporate the role of the NLC relating to monitoring and oversight responsibilities over land use planning throughout the country as per Article 67(2)(h) of the Constitution.</p>	<p>Revise Paragraph 4.6 to state that the recommendations on land use planning shall be carried out in consultation with the NLC.</p>
	<p>Land for Urban Development Paragraph 6.2.1 of the Policy recommends the following measures, among others, with the County Governments as the lead agency for implementation:</p> <ul style="list-style-type: none"> i. Identifying and acquiring adequate land for urban development; and 	<p>Paragraph 6.2.1 should be revised to incorporate the role of the NLC in the function of management of public land on behalf of the National Government and County Governments and monitoring and oversight responsibilities over land use planning throughout the country as</p>	<p>Revise Paragraph 6.2.1 to state that the following roles shall be carried out in consultation with the NLC:</p> <ul style="list-style-type: none"> i. Identifying and acquiring adequate land for urban development; and ii. Formalizing land ownership in informal

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>ii. Formalizing land ownership in informal neighbourhoods.</p> <p>This conflicts with the constitutional role of the NLC in Article 67(2)(a) and (h) of the Constitution which gives the NLC the function of management of public land on behalf of the National Government and County Governments and monitoring and oversight responsibilities over land use planning throughout the country.</p>	<p>per Article 67(2)(a) and (h) of the Constitution.</p>	<p>neighbourhoods.</p>
	<p>Land Allocation Paragraph 6.2.3 of the Policy recommends the following measures, among others, with the County Governments as the lead agency for implementation:</p> <ul style="list-style-type: none"> i. Investigating and punishing illegality and irregularity in past land allocations; and ii. Streamlining the process for the allocation of public land. <p>This conflicts with the constitutional role of the NLC in Article 67(2)(a) and (e) of the Constitution which gives the NLC the functions of management of public land on behalf of the National Government and County Governments and to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.</p>	<p>Paragraph 6.2.3 should be revised to incorporate the role of the NLC in the functions of management of public land on behalf of the National Government and County Governments and to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress under Article 67(2)(a) and (e) of the Constitution.</p>	<p>Revise Paragraph 6.2.3 to state that the following roles shall be carried out in consultation with the NLC:</p> <ul style="list-style-type: none"> i. Investigating and punishing illegality and irregularity in past land allocations; and ii. Streamlining the process for the allocation of public land.
	<p>Urban Public Open Space and Other Community Land Paragraph 6.2.6 of the Policy recommends establishment measures for securing such land through surveying,</p>	<p>Paragraph 6.2.6 should be revised to incorporate the role of the NLC in the function of monitoring and having oversight responsibilities over land</p>	<p>Revise Paragraph 6.2.6 to state that surveying, planning and titling shall be carried out in consultation with the NLC.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>planning and titling, among other measures, with the County Governments as the lead agency for implementation.</p> <p>This conflicts with the constitutional role of the NLC in Article 67(2)(h) of the Constitution which gives the NLC the function of monitoring and having oversight responsibilities over land use planning throughout the country.</p>	<p>use planning throughout the country as per Article 67(2)(h) of the Constitution.</p>	
	<p>Urban Informal Housing Paragraph 8.5 of the Policy recommends the imposition of severe penalties for invasion on public land, among other measures, with the County Governments as the lead agency for implementation. This conflicts with the constitutional role of the NLC in Article 67(2)(e) of the Constitution which gives the NLC the function of investigating, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.</p>	<p>Paragraph 8.5 should be revised to incorporate the role of the NLC in the function of investigating, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress as per Article 67(2)(e) of the Constitution.</p>	<p>Revise Paragraph 8.5 to state that the imposition of penalties for invasion on public land shall be carried out in consultation with the NLC.</p>
<p>Urban Land Use Planning, Monitoring and Oversight Guidelines (2016) (National)</p>	<p>The Guidelines were developed by the NLC in line with its constitutional function of monitoring and having oversight responsibilities over land use planning throughout the country under Article 67(2)(h) of the Constitution.</p> <p>The NLC has power to make Regulations for the carrying out of its functions as per Section 36 of National Land Commission Act, 2012.</p>	<p>The Guidelines should form a foundation for the preparation of Regulations in relation to land use planning as part of the monitoring and oversight responsibility of the NLC.</p>	<p>The NLC should make Regulations in relation to land use planning.</p>
<p>The National Housing Policy (Sessional Paper No. 3 of 2009)</p>	<p>The Policy was developed before the promulgation of the Constitution.</p>	<p>The Policy should be reviewed to incorporate the devolved system of government and the</p>	<p>Revise the Policy in its entirety.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
(National)	The Policy does not incorporate the devolved system of government and especially the functions of the County Governments in relation to County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution.	distribution of functions between the National Government and County Governments as set out in the Fourth Schedule to the Constitution. It should also be reviewed to incorporate the functions of the NLC in Article 67 of the Constitution.	
	<p>Upgrading of Slums and Informal Settlements Paragraph 31 of the Policy states that the Government will streamline acquisition of land for housing the poor, adopt appropriate tenure systems, planning standards to suit given slum settlements and prevent unwarranted destruction of existing housing stock and displacement of the residents.</p> <p>This conflicts with the role of the County Governments in County planning and development, in relation to housing, as per Part 2(8) of the Fourth Schedule to the Constitution.</p> <p>It also conflicts with the role of the NLC in Article 67(2)(a) and (h) of the Constitution, in relation to management of public land on behalf of the National Government and County Governments and monitoring and oversight responsibilities over land use planning.</p>	<p>Paragraph 31 of the Policy should be amended to incorporate the role of the County Governments in County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution. and the role of the NLC in relation to management of public land on behalf of the National Government and County Governments and monitoring and oversight responsibilities over and use planning as per Article 67(2)(a) and (h) of the Constitution.</p>	<p>Paragraph 31 of the Policy should be amended to state that the National Government and County Governments, in consultation with the NLC, will streamline acquisition of land for housing the poor, adopt appropriate tenure systems, planning standards to suit given slum settlements and prevent unwarranted destruction of existing housing stock and displacement of the residents.</p>
	<p>Rural Housing Paragraph 35 of the Policy states that the Government will promote a sustainable process of shelter improvement and maintenance in the rural areas.</p>	<p>Paragraph 35 of the Policy should be amended to incorporate the role of the County Governments in County planning and development in relation to housing as per Part 2(8) of the Fourth Schedule to</p>	<p>Paragraph 35 of the Policy should be amended to state that the National Government and the County Governments shall promote a sustainable process of shelter improvement and</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>This conflicts with the role of the County Governments in County planning and development, in relation to housing, as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>the Constitution.</p>	<p>maintenance in the rural areas.</p>
	<p>Land Use Planning and Management Paragraph 41 of the Policy states that the Government will provide facilitation for the supply of serviced land at affordable prices by, among other things:</p> <ul style="list-style-type: none"> i. Establishing a land bank for public housing through purchase or compulsory acquisition of land that is not fully utilized; ii. Imposing a progressive tax over and above the current land rents and rates on vacant urban land after reasonable notification to help curb speculative activities and release land for development; and iii. Re-planning and re-development of existing housing estates that do not provide for maximum permissible or highest and best use of land. <p>This conflicts with the role of the County Governments in County planning and development, in relation to housing, as per Part 2(8) of the Fourth Schedule to the Constitution and Article 209(3)(a) of the Constitution which empowers County Governments to impose property rates.</p>	<p>Paragraph 41 of the Policy should be amended to incorporate the role of the County Governments in County planning and development and imposition of property rates as per Part 2(8) of the Fourth Schedule to the Constitution and Article 209(3)(a) of the Constitution and the role of the NLC in relation to management of public land on behalf of the National Government and County Governments and monitoring and oversight responsibilities over land use planning as per Article 67(2)(a) and (h) of the Constitution.</p>	<p>Paragraph 41 of the Policy should be amended to state that the National Government and the County Governments shall, in consultation with the NLC, provide facilitation for the supply of serviced land at affordable prices by:</p> <ul style="list-style-type: none"> i. Establishing a land bank for public housing through purchase or compulsory acquisition of land that is not fully utilized; and ii. Re-planning and re-development of existing housing estates that do not provide for maximum permissible or highest and best use of land. <p>Furthermore, the National Government shall, in consultation with the NLC impose a progressive tax over and above the current land rents while the County Governments shall, in consultation with the NLC impose a progressive tax over and above the current rates on vacant urban land after reasonable notification to help curb speculative activities and release land for development.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>It also conflicts with the role of the NLC in Article 67(2)(a) and (h) of the Constitution, in relation to management of public land on behalf of the National Government and County Governments and monitoring and oversight responsibilities over land use planning.</p>		
	<p>Infrastructure Paragraph 44 of the Policy gives the local governments roles relating to infrastructure such as collaboration with private developers in developing infrastructure in rural and urban areas.</p> <p>This does not incorporate the devolved system of government and the role of the County Governments in relation to infrastructure such as electricity, roads and water and sewerage services, as per Part 2(5), (8) and (11) of the Fourth Schedule to the Constitution.</p>	<p>Paragraph 44 of the Policy should be amended to incorporate the devolved system of government and the role of the County Governments in relation to infrastructure development as per Part 2(5), (8) and (11) of the Fourth Schedule to the Constitution.</p>	<p>Paragraph 44 of the Policy should be amended to refer to the County Governments instead of local governments.</p>
	<p>Estate Management and Maintenance Paragraph 59 of the Policy states that to address the problems relating to estate management and maintenance, the following actions, among others, will be taken:</p> <ul style="list-style-type: none"> i. Standards will be formulated for acceptable maintenance status of the built environment in which planned preventive and corrective maintenance works will meet legally enforceable requirements; and ii. Preparation and submission of approved "as-built" drawings and maintenance manuals for each new building 	<p>Paragraph 59 of the Policy should be amended to incorporate role of the County Governments in County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Paragraph 59 of the Policy should be amended to state that the National Government and the County Governments shall take the proposed actions to address the problems relating to estate management and maintenance.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>developed will be made a pre-requisite for obtaining a "Certificate of Occupancy" by the Development Control Agencies.</p> <p>This conflicts with the role of the County Governments in County planning and development in the Fourth Schedule to the Constitution</p>		
	<p>Disaster Management Paragraph 64 of the Policy proposes measures that will be put in place to strengthen the country's mechanism to manage disasters.</p> <p>Disaster management is a concurrent function of the National Government under Part 1(24) of the Fourth Schedule to the Constitution and the County Governments under Part 2(12) of the Fourth Schedule to the Constitution.</p>	<p>Paragraph 64 of the Policy should be amended to harmonize the concurrent function of the National Government and County Governments of disaster management under Part 1(24) and Part 2(12) of the Fourth Schedule to the Constitution respectively.</p>	<p>Paragraph 64 of the Policy should be amended to state the proposed measures to strengthen the country's mechanism to manage disasters shall be carried out in consultation with the relevant County Governments.</p>
	<p>Institutional framework Paragraph 88 of the Policy gives the local governments administrative roles relating to housing.</p> <p>This does not incorporate the devolved system of government and the role of the County Governments in relation to housing as part of County planning and development, as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Paragraph 88 of the Policy should be amended to incorporate the devolved system of government and the role of the County Governments in relation to housing as part of County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Paragraph 88 of the Policy should be amended to refer to the County Governments instead of local governments.</p>
<p>The National Land Use Policy ("the NLUP") (Sessional Paper No. 1 of 2017) (National)</p>	<p>The Policy was developed with the overall goal to provide legal, administrative, institutional and technological framework for optimal utilization and productivity of land related resources in a sustainable and desirable</p>	<p>The Policy recognizes the role the National Government and the County Governments as well as the NLC in land use planning.</p>	<p>The Policy complies with the Constitution.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>manner at National, County and community levels.</p> <p>So as to ensure efficient, productive and sustainable use of land, the Policy proposes measures to be taken by the National Government and County Governments such as sound land use practices.</p> <p>The Policy also proposes the development of land use plans at both National and County levels with full participation of all stakeholders.</p> <p>The Policy recognizes the Constitutional mandate of the NLC in relation to land and land use and its principal responsibility for ensuring the sound implementation of planning policy.</p>		
<p>The National Spatial Plan 2015-2045 (“the NSP”)</p>	<p>The roles of the NLC under Article 67 of the Constitution have generally not been incorporated in the NSP.</p>	<p>The Policy should be revised to align it with the Constitutional roles of the NLC.</p>	<p>Revision of the Policy to align it with the Constitution.</p>
<p>(National)</p>	<p><u>Agriculture Capability Assessment</u></p> <p>The NSP proposes measures such as:</p> <ul style="list-style-type: none"> i. Development application for change of user in the high potential areas should be required to present a rigorous justification for the intention; and ii. Intensification of the use of land within the urban areas other than outward growth. <p>The proposed measures do not incorporate the role of the NLC in Article 67(2) (h) of the Constitution in relation to its monitoring and oversight responsibility over land use planning.</p>	<p>Revision of the NSP to incorporate the role of the NLC in land use planning as per Article 67(2) (h) of the Constitution.</p>	<p>Revision of the NSP state that the proposed measures will be taken in consultation with the NLC.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>Urban Land Requirement Assessment</p> <p>The NSP proposes measures such as:</p> <ul style="list-style-type: none"> i. Alleviation of the wastage of land in informal settlement and encouraging of infill and mixed development; ii. Repossession of all illegally acquired land for roads infrastructure; and iii. Upgrading of slums. <p>The proposed measures do not incorporate the role of the NLC in Article 67(2)(e) and (h) of the Constitution in relation to its monitoring and oversight responsibility over land use planning and initiation of investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommendation of appropriate redress.</p>	<p>Revision of the NSP to incorporate the role of the NLC in Article 67(2)(e) and (h) of the Constitution in relation to its monitoring and oversight responsibility over land use planning and initiation of investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommendation of appropriate redress.</p>	<p>Revision of the NSP state that the proposed measures will be taken in consultation with the NLC.</p>
<p>The National Slum Upgrading and Prevention Policy (National)</p>	<p>The formulation of the Policy involved the input of the County Governments and the Policy assigns roles between the National Government and County Governments in relation to the recommendations.</p> <p>However, the Policy does not incorporate the role of the NLC in Article 67(2)(a) and (h) of the Constitution in relation to monitoring and oversight of land use planning and management of public land on behalf of the National Government and County Governments.</p> <p>This is despite the fact that most makeshift settlements are established on public land and one of the policy recommendations includes transfer of tenure on</p>	<p>Revision of the Policy to incorporate the role of the NLC in Article 67(2)(e) and (h) of the Constitution in relation to monitoring and oversight of land use planning and management of public land on behalf of the National Government and County Governments.</p>	<p>Revision of the Policy.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	upgraded slums in public land to beneficiaries and repossession of land for use in slum upgrading.		
National Environment Policy, 2013 (National)	The Policy does not effectively incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation as stated in Part 2(10) of the Fourth Schedule to the Constitution.	Revision of the Policy to effectively provide for the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation as per Part 2(10) of the Fourth Schedule to the Constitution.	Revision of the Policy.
	Forest Ecosystems Paragraph 4.1 of the Policy does not incorporate the role of the County Governments in the implementation of National Government policies on forestry as stated in Part 2(10) of the Fourth Schedule to the Constitution.	Revision of the Paragraph to incorporate the role of the County Governments in the implementation of National Government policies relating to forestry as per Part 2(10) of the Fourth Schedule to the Constitution.	Revision of the Paragraph to state that the implementation of the forest and other related laws and policies shall be carried out by NEMA, in partnership with the County Governments.
	Freshwater and Wetland Ecosystems Paragraph 4.2 of the Policy does not incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation as stated in Part 2(10) of the Fourth Schedule to the Constitution.	Revision of the Paragraph to incorporate the role of the County Governments in the implementation of National Government policies relating to freshwater and wetland resources as per Part 2(10) of the Fourth Schedule to the Constitution.	Revision of the Paragraph to state that the implementation of freshwater and wetland resources laws and policies shall be carried out by NEMA, in partnership with the County Governments.
	Coastal and Marine Ecosystems Paragraph 4.3 of the Policy does not incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation as stated in Part 2(10) of the Fourth Schedule to the Constitution.	Revision of the Paragraph to incorporate the role of the County Governments in the implementation of National Government policies relating to coastal and marine resources as per Part 2(10) of the Fourth Schedule to the Constitution.	Revision of the Paragraph to state that the implementation of coastal and marine resources laws and policies shall be carried out by NEMA, in partnership with the County Governments.

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p><u>Mountain Ecosystems</u> Paragraph 4.4 of the Policy does not incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation as stated in Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to incorporate the role of the County Governments in the implementation of National Government policies relating mountain resources as per Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to state that the implementation of mountain resources laws and policies shall be carried out by NEMA, in partnership with the County Governments.</p>
	<p><u>Arid and Semi-Arid Lands Ecosystems</u> Paragraph 4.5 of the Policy does not incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation as stated in Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to incorporate the role of the County Governments in the implementation of National Government policies relating to arid and semi-arid lands as per Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to state that the implementation of arid and semi-arid land laws and policies shall be carried out by NEMA, in partnership with the County Governments the County Governments.</p>
	<p><u>Land</u> Paragraph 4.6 of the Policy states that the Government will, among other things:</p> <ul style="list-style-type: none"> i. Ensure implementation of the Constitution and the National Land Policy to incorporate sustainable conservation and management of the environment and resources; ii. Promote best practices for optimal and sustainable land use; and iii. Promote sustainable urban and peri-urban land uses. <p>The Paragraph does not incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation and in relation to County planning and development as stated in Part 2(10) of the Fourth Schedule to the</p>	<p>Revision of the Paragraph to incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation relating to land, County planning and development and the management of urban areas as per Part 2(10) of the Fourth Schedule to the Constitution and Section 12(1) of the Urban Areas and Cities Act.</p> <p>Revision of the Paragraph to incorporate the monitoring and oversight role of the NLC as per Article 67(2)(h) of the Constitution.</p>	<p>Revision of the Paragraph to state that the implementation of land laws and policies on natural resources and environmental conservation relating to land shall be carried out by the National and County Governments in consultation with the NLC.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>Constitution and in relation to the management of urban areas as per Section 12(1) of the Urban Areas and Cities Act, which was enacted in compliance with Article 184 of the Constitution.</p> <p>It also does not incorporate the functions of the NLC in Article 67(2)(h) of the Constitution in relation to monitoring and oversight of land use planning.</p>		
	<p>Soils Paragraph 4.7 of the Policy does not incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation as stated in Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation relating to soils, and especially on soil conservation as per Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to state that the implementation of laws and policies on natural resources and environmental conservation relating to soil conservation shall be carried out by NEMA, in partnership with the County Governments.</p>
	<p>Minerals Paragraph 4.8 of the Policy does not incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation as stated in Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation relating to minerals as per Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to state that the implementation of laws and policies on natural resources and environmental conservation relating to minerals shall be carried out by NEMA, in partnership with the County Governments.</p>
	<p>Biodiversity Paragraph 4.9 of the Policy does not incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation as stated in Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation relating to biodiversity as per Part 2(10) of the Fourth Schedule to the</p>	<p>Revision of the Paragraph to state that the implementation of laws and policies on natural resources and environmental conservation relating to biodiversity shall be carried out by NEMA, in partnership with the County Governments.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
		Constitution.	
	<p>Wildlife Resources Paragraph 4.10 of the Policy does not incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation as stated in Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation relating to wildlife resources as per Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to state that the implementation of laws and policies on natural resources and environmental conservation relating to wildlife resources shall be carried out by NEMA, in partnership with the County Governments.</p>
	<p>Wildlife Resources Paragraph 4.11 of the Policy does not incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation as stated in Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation relating to livestock as per Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to state that the implementation of laws and policies on natural resources and environmental conservation relating to livestock shall be carried out by NEMA, in partnership with the County Governments.</p>
	<p>Fisheries Paragraph 4.12 of the Policy does not incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation as stated in Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation relating to fisheries as per Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to state that the implementation of laws and policies on natural resources and environmental conservation relating to fisheries shall be carried out by NEMA, in partnership with the County Governments.</p>
	<p>Industrialization and Environment Paragraph 5.5 of the Policy does not incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation and in relation to County planning and development as stated in Part 2(10) of the</p>	<p>Revision of the Paragraph to incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation relating to industrialization and environment as per Part 2(10) of the Fourth</p>	<p>Revision of the Paragraph to state that the implementation of laws and policies on natural resources and environmental conservation relating to industrialization and environment shall be carried out by NEMA, in partnership with the County Governments,</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	Fourth Schedule to the Constitution.	Schedule to the Constitution.	especially in relation to development and promotion of the use of strategic environmental assessment in the industrial development plans, policies and programmes.
	<u>Infrastructural Development and Environment</u> Paragraph 5.6 of the Policy does not incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation and in relation to County planning and development as stated in Part 2(10) of the Fourth Schedule to the Constitution.	Revision of the Paragraph to incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation relating to infrastructural development and environment as per Part 2(10) of the Fourth Schedule to the Constitution.	Revision of the Paragraph to state that the implementation of laws and policies on natural resources and environmental conservation relating to infrastructural development and environment shall be carried out by NEMA, in partnership with the County Governments, especially in relation to environmental assessment and public participation.
	<u>Human Settlement</u> Paragraph 5.8 of the Policy does not incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation and in relation to County planning and development, especially in relation to housing, as stated in Part 2(10) of the Fourth Schedule to the Constitution.	Revision of the Paragraph to incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation relating to human settlement as per Part 2(10) of the Fourth Schedule to the Constitution.	Revision of the Paragraph to state that the implementation of laws and policies on natural resources and environmental conservation relating to human settlement, especially in relation to housing shall be carried out by NEMA, in partnership with the County Governments.
	<u>Energy Use, Efficiency and Conservation</u> Paragraph 5.9 of the Policy does not incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation and in relation to County planning and development, specifically energy regulation, as stated in Part 2(10) of the	Revision of the Paragraph to incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation relating to energy regulation as per Part 2(10) of the Fourth Schedule to the Constitution.	Revision of the Paragraph to state that the implementation of laws and policies on natural resources and environmental conservation relating to energy shall be carried out by NEMA, in partnership with the County Governments.

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>Fourth Schedule to the Constitution.</p>		
	<p><u>Emergency Preparedness and Disaster Management</u> Paragraph 5.11 of the Policy does not incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation and in relation to disaster management, as stated in Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to incorporate the role of the County Governments in the implementation of National Government policies on natural resources and environmental conservation relating to disaster management as per Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to state that the implementation of laws and policies on natural resources and environmental conservation relating to disaster management shall be carried out by NEMA, in partnership with the County Governments.</p>
	<p><u>Air Quality</u> Paragraph 6.1 of the Policy does not incorporate the role of the County Governments in the control of air pollution as stated in Part 2(3) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to incorporate the role of the County Governments in the control of air pollution as per Part 2(3) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to state that the functions relating to the control of air pollution shall be carried out by NEMA, in partnership with the County Governments.</p>
	<p><u>Water and Sanitation</u> Paragraph 6.2 of the Policy does not incorporate the role of the County Governments in the provision of water and sanitation services in the counties as stated in Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to incorporate the role of the County Governments in the provision of water and sanitation services as per Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to state that the functions relating to the provision of water and sanitation services in the counties shall be carried out by NEMA, in partnership with the County Governments.</p>
	<p><u>Noise</u> Paragraph 6.6 of the Policy does not incorporate the role of the County Governments in the control of noise pollution as stated in Part 2(3) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to incorporate the role of the County Governments in the control of noise pollution as per Part 2(3) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to state that the functions relating to the control of noise pollution shall be carried out by NEMA, in partnership with the County Governments.</p>
	<p><u>Institutional Arrangements</u> Paragraph 8.2 of the Policy does not incorporate the key institutional role of the County Governments in the implementation of national policies on the environment as stated in Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the Paragraph to incorporate the institutional role of the County Governments in the implementation of national policies on the environment.</p>	<p>Revision of the Paragraph to incorporate that the functions relating to the implementation of national policies on the environment shall be carried out by NEMA, in partnership with the County Governments.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
<p>National Report on Human Settlements and the New Urban Agenda towards Habitat III (October 2016)</p> <p>(National)</p>	<p>The preparation of the Report involved the County Governments.</p> <p>However, some of the recommendations do not consider the concurrent functions of the National Government and County Governments in the Fourth Schedule to the Constitution.</p>	<p>Revision of the recommendations to incorporate the concurrent functions of the National Government and County Governments.</p>	<p>Revision of the recommendations to comply with the Constitution.</p>
	<p>Land and Urban Planning Paragraph 3.9 of the Report recommends some of the following measures:</p> <ul style="list-style-type: none"> i. Integration and prioritization of urban agriculture in planning; and ii. Strategizing of ways to ease congestion in cities. <p>Land planning is part of the concurrent functions of the National Government and County Governments in Part 2(8) of the Fourth Schedule to the Constitution. There is therefore need for harmonization of the function in the recommendations.</p> <p>The Paragraph also contravenes the mandate of the County Governments to manage urban areas as provided for in Section 12(1) of the Urban Areas and Cities Act, which was enacted to give effect to Article 184 of the Constitution.</p>	<p>Revision of the recommendations to harmonize the concurrent functions of the National Government and County Governments in relation to land planning.</p>	<p>Revision of the recommendations to state that integration and prioritization of urban agriculture in planning and strategizing of ways to ease congestion in cities shall be carried out in partnership with the National Government and the relevant County Governments.</p>
	<p>Environment and Urbanization Paragraph 4.8 of the Report recommends the some of the following measures:</p> <ul style="list-style-type: none"> i. Capacity building and training on disaster management; and 	<p>Revision of the recommendations to incorporate the concurrent functions of the National Government and County Governments in relation to disaster management and</p>	<p>Revision of the recommendations to state that capacity building and training on disaster management and development of strategies for provision of infrastructural services in</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>ii. Development of strategies for provision of infrastructural services in small and upcoming urban areas.</p> <p>Disaster management and infrastructure are part of the concurrent functions of the National Government in Part 1(24) of the Fourth Schedule to the Constitution and County Governments in Part 2(12) of the Fourth Schedule to the Constitution. There is therefore need for harmonization of the functions in the recommendations.</p>	<p>infrastructure as per Part 1(24) of the Fourth Schedule to the Constitution and Part 2(12) of the Fourth Schedule to the Constitution.</p>	<p>small and upcoming urban areas shall be carried out in partnership with the relevant County Governments.</p>
	<p>Housing and Basic Services Paragraph 7.10 of the Report recommends the some of the following measures:</p> <p>i. Development of social housing for vulnerable groups;</p> <p>ii. Emphasis on urban management and shelter strategies geared towards prevention of slum growth and approaches for effective slums and informal settlements upgrading.</p> <p>Housing is part of the concurrent functions of the National Government in Part 1(20) of the Fourth Schedule to the Constitution and County Governments in Part 2(8) of the Fourth Schedule to the Constitution. There is therefore need for harmonization of the function in the recommendations.</p>	<p>Revision of the recommendations to incorporate the concurrent functions of the National Government and County Governments in relation to housing as per Part 1(20) of the Fourth Schedule to the Constitution and Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Revision of the recommendations to state that development of social housing for vulnerable groups and emphasis on urban management and shelter strategies geared towards prevention of slum growth and approaches for effective slums and informal settlements upgrading shall be carried out in partnership with the relevant County Governments.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
<p>Sessional Paper No. 10 of 2012 on Kenya Vision 2030</p>	<p>The Policy was developed by the Office of the Prime Minister, Ministry of State and Planning, National Development and Vision 2030 as a long-term vision to guide the development of the country.</p> <p>Some of the foundations on which the Policy is anchored include land reform, infrastructure and energy. These include concurrent functions of the National and County Governments under the Fourth Schedule to the Constitution such as land planning, transport and electricity and gas reticulation and energy regulation.</p>	<p>The Policy should be reviewed to align it with the Fourth Schedule to the Constitution or to provide a clear link between the functions of the National Government with those of the County Governments.</p>	<p>Amendment of the Policy to align it with the Constitution or to provide a clear link between the functions of the National Government with those of the County Governments.</p> <p>The recommended strategies and flagship projects should also incorporate the role of the NLC under Article 67 of the Constitution.</p> <p>The Policy also mostly makes recommendations in relation to the 2008-2012 period. There is need to come up with more detailed medium-term plans in relation to the various sectors addressed in the Policy.</p>
	<p>Paragraph 2.1 (Infrastructure) of the Policy proposes some strategies to improve infrastructure services and to maximise the economic and social impact of infrastructure development and management. These include:</p> <ul style="list-style-type: none"> i. Strengthening the institutional framework for infrastructure development and accelerating the speed of completion. Raising efficiency and quality of infrastructure projects, and increasing the pace of implementation of infrastructure projects so that they are completed in specified time frames; ii. Developing and maintaining an integrated, safe and efficient transport network; 	<p>The Paragraph should be amended to align the strategies and flagship projects in relation to infrastructure to the roles of the National Government and County Governments under the Fourth Schedule to the Constitution or to provide a clear link between the functions of the National Government with those of the County Governments.</p> <p>The strategies and flagship projects relating to land planning should also be carried out in consultation with the NLC, as per Article 67(2)(h) of the Constitution.</p>	<p>Amendment of the Paragraph to state that the strategies and flagship projects to improve infrastructure services and to maximise the economic and social impact of infrastructure development and management shall be carried out in consultation with the National Government and the County Governments.</p> <p>The Paragraph should also be amended to state that the strategies and flagship projects relating to land planning should be carried out in consultation with the NLC.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<ul style="list-style-type: none"> iii. Supporting the development of infrastructure initiatives around flagship projects; iv. Implementing infrastructure projects that will stimulate demand in hitherto neglected areas targeting increased connectivity and reduced transport and other infrastructure costs; v. Developing a national spatial plan to optimise the development and utilisation of infrastructure facilities and services; and vi. Modernising and expanding sea port facilities. 		
	<p>The strategies are to be implemented through strategies selected flagship projects in transport, energy, ICT, construction, water and sanitation, and sound environmental management, including:</p> <ul style="list-style-type: none"> i. The First National Spatial Plan; ii. A 50-year Integrated National Transport Master Plan; iii. Dredging and /deepening of Mombasa Port; iv. Nairobi metropolitan region bus rapid transit/System; v. Development of a new transport corridor to Southern Sudan and Ethiopia; vi. National road safety programme; vii. Computerised information maintenance management systems programme; and viii. Weather Modification Programme. 		

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>Some of the strategies and flagship projects include concurrent functions of the National and County Governments under the Fourth Schedule to the Constitution such as traffic, construction of roads, marine navigation and ferries and harbours, disaster management and land planning.</p> <p>The strategies and flagship projects relating to land planning do not incorporate the role of the NLC under Article 67(2)(h) of the Constitution of monitoring and having oversight responsibilities over land use planning throughout the country.</p>		
	<p>Paragraph 2.7 (Land Reforms) of the Policy states that to provide adequate support to the projects and programmes expected under Vision 2030, the following policies will be accorded priority:</p> <ul style="list-style-type: none"> i. Sustainable land use; ii. Land reform; iii. Land and boundary disputes; and iv. Land information system. <p>The recommended land reform policies include concurrent functions of the National and County Governments under Part 1(21) and Part 2(8) of the Fourth Schedule to the Constitution such as land planning.</p> <p>They also do not incorporate the role of the NLC under Article 67(2)(a), (f) and (h) of the Constitution in relation to management of public land on</p>	<p>The Paragraph should be amended to align the projects and programmes in relation to land reform to the roles of the National Government and the County Governments such as land planning as per Part 1(21) and Part 2(8) of the Fourth Schedule to the Constitution or to provide a clear link between the functions of the National Government with those of the County Governments.</p> <p>The projects and programmes in relation to land reform should also be carried out in consultation with the NLC as per Article 67(2)(a), (f) and (h) of the Constitution.</p>	<p>Amendment of the Paragraph to state that the projects and programmes in relation to land reform shall be carried out in consultation with the National Government and the County Governments.</p> <p>The Paragraph should also be amended to state that the projects and programmes in relation to land reform shall be carried out in consultation with the NLC.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>behalf of the National Government and County Governments, encouraging traditional dispute resolution in land conflicts and monitoring and having oversight responsibilities over land use planning throughout the country.</p>		
	<p>Paragraph 3.3 (Agriculture) states that to achieve the vision for the agricultural sector, it will be necessary to focus on key strategic thrusts, including:</p> <ul style="list-style-type: none"> i. Transforming land use to ensure better utilisation of high and medium potential lands; and ii. Developing arid and semi-arid areas for both crops and livestock. <p>The flagship projects to be implemented in the agricultural sector also include:</p> <ul style="list-style-type: none"> i. Land registry; and ii. Land use master plan. <p>The recommended strategies and flagship projects for improving the agricultural sector include concurrent functions of the National and County Governments under Part 1(21) and Part 2(8) of the Fourth Schedule to the Constitution such as land planning.</p> <p>They also do not incorporate the role of the NLC under Article 67(2)(c) and (h) of the Constitution in relation to advising the National Government on a comprehensive programme for the registration of title in land throughout Kenya and monitoring and having oversight responsibilities over</p>	<p>The Paragraph should be amended to align the strategies and flagship projects in relation to agriculture to the roles of the National and County Governments as per Part 1(21) and Part 2(8) of the Fourth Schedule to the Constitution or to provide a clear link between the functions of the National Government with those of the County Governments.</p> <p>The strategies and flagship projects in relation to agriculture should also be carried out in consultation with the NLC as per Article 67(2)(c) and (h) of the Constitution.</p>	<p>Amendment of the Paragraph to state that the strategies and flagship projects to improve the agricultural sector shall be carried out in consultation with the National Government and the County Governments.</p> <p>The Paragraph should also be amended to state that the strategies and flagship projects shall be carried out in consultation with the NLC.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	land use planning throughout the country.		
	<p>Paragraph 4.6 (Environmental Management) of the Policy recommends the following flagship projects in relation to environmental management:</p> <ul style="list-style-type: none"> i. Water catchment management; and ii. Land cover and land use mapping. <p>The following initiatives are also recommended to support implementation of the flagship projects:</p> <ul style="list-style-type: none"> i. Farmland and dryland tree-planting initiative; and ii. Disaster preparedness. <p>The recommended flagship projects and initiatives in relation to environmental management include concurrent functions of the National and County Governments under the Fourth Schedule to the Constitution such as land planning, disaster management and protection of the environment and natural resources.</p> <p>They also do not incorporate the role of the NLC under Article 67(2)(h) of the Constitution of monitoring and having oversight responsibilities over land use planning throughout the country.</p>	<p>The Paragraph should be amended to align the flagship projects and initiatives in relation to environmental management with the Fourth Schedule to the Constitution or to provide a clear link between the functions of the National Government with those of the County Governments.</p> <p>The strategies and flagship projects should also be carried out in consultation with the NLC as per Article 67(2)(h) of the Constitution.</p>	<p>Amendment of the Paragraph to state that the flagship projects and initiatives in relation to environmental management shall be carried out in consultation with the National Government and the County Governments.</p> <p>The Paragraph should also be amended to state that the flagship projects and initiatives in relation to environmental management shall be carried out in consultation with the NLC.</p>
Urban Areas and Cities Act (National)	<p>The provisions of the Act are not in line with the Constitution and are also not comprehensive.</p> <p>The role of the NLC under Article 67(2)(h) of the Constitution in relation to monitoring and oversight</p>	<p>Generally, the Act needs to be amended to align it with the Fourth Schedule to the Constitution or to provide a clear link between the functions of the National Government with those of the County Governments.</p>	<p>Amendment of the Act to align it with the Constitution or to provide a clear link between the functions of the National Government with those of the County Governments.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	responsibilities over land use planning throughout the country has not been incorporated in the Act.	Additionally, the provisions of the Act need to be made more comprehensive.	
	<p>Section 20 sets out the functions of a Board of a city or municipality as including:</p> <ul style="list-style-type: none"> i. Formulation and implementation of an integrated development plan; ii. Control of land use, land subdivision, land development and zoning by public and private sectors for any purpose; iii. Promotion and undertaking of infrastructural development and services within the city or municipality as the case may be delegated by the County Government; iv. development and management of schemes, including site development in collaboration with the relevant national and County agencies; <p>The functions set out in this Section conflict with some of the functions of the National Government as well as the NLC.</p> <p>Additionally, the Regulations under the Act have as yet not been published. Without the necessary clarity from the Regulations, the Section seemingly conflicts with the following functions of the National Government as set out in Part 1(18), (21) and (22) of the Fourth Schedule to the Constitution:</p> <ul style="list-style-type: none"> i. Land planning; ii. Transport; and iii. Protection of the environment. 	<p>Section 20 should be amended to align it with Part 1(18), (21) and (22) of the Fourth Schedule to the Constitution.</p>	<p>The Section should be amended to state that the functions of a Board or of a city or municipality shall be carried out in consultation with the relevant National Government authorities.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>Section 33(2) states that for efficient service delivery, Cities and Municipalities may jointly provide cross-city and cross-municipality services and may, in that regard jointly finance the services.</p> <p>The Section poses a possible conflict with Article 212 of the Constitution which states that a County Government may borrow only if the National Government guarantees the loan and with the approval of the County Government’s assembly.</p>	<p>The Section should be amended to harmonize it with Article 212 of the Constitution.</p>	<p>The Section should be amended to state that for efficient service delivery, Cities and Municipalities may jointly provide cross-city and cross-municipality services and may, in that regard jointly finance the services, provided that in the case of borrowing of finances for purposes of the services by the city or municipality, Article 212 of the Constitution shall be complied with. This is to harmonize the financing provisions.</p>
	<p>Section 36 requires all Cities and Municipalities to operate within the framework of integrated development planning that shall, among other things, be the basis for:</p> <ul style="list-style-type: none"> i. the preparation of environmental management plans; ii. provision of physical and social infrastructure and transportation; iii. preparation of annual strategic plans for a city or municipality; iv. overall delivery of service including provision of water, electricity, health telecommunications and solid waste management; v. the preparation of a geographic information system for a city or municipality; vi. a framework for regulated urban agriculture; and vii. development control. <p>The Section conflicts with the following functions of the National Government as set out in Part 1(18), (21) (22), (29) and (31) of the Fourth Schedule to the Constitution:</p>	<p>The Section should be amended to harmonize the concurrent functions of the National Government and County Governments as set out in Part 1(18), (21) (22), (29) and (31) of the Fourth Schedule to the Constitution, especially in relation to:</p> <ul style="list-style-type: none"> i. Land planning; ii. Transport; iii. Agricultural policy; iv. Electricity; and v. Protection of the environment. 	<p>The Section should be amended to state that all Cities and Municipalities shall operate within the framework of integrated development planning that shall, among other things, be the basis for the stated activities, in consultation with the relevant National Government authorities.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<ul style="list-style-type: none"> i. Land planning; ii. Transport; iii. Agricultural policy; iv. Electricity; and v. Protection of the environment. 		
	<p>The First Schedule classifies urban areas and Cities according to services such as:</p> <ul style="list-style-type: none"> i. Planning and Development Control; ii. Traffic Control and Parking; iii. Water and Sanitation; iv. Street Lighting; v. Public Transport; vi. Storm Drainage; vii. Electricity and Gas Reticulation; viii. Solid waste management; ix. Air pollution; x. Local Distributor Roads; xi. Airports and Airstrips; and xii. Marine Water front. <p>Some of the services listed in the First Schedule require harmonization with the functions of the National Government under Part 1 of the Fourth Schedule to the Constitution such as:</p> <ul style="list-style-type: none"> i. Land planning; ii. Traffic; iii. Transport; iv. Health facilities; v. Sports; vi. Electricity and Gas Reticulation; and vii. Marine navigation. 	<p>The First Schedule should be amended to reflect the concurrent nature of some of the services provided by the County Governments.</p>	<p>The First Schedule should be amended to harmonize the concurrent functions of the National Government and County Governments in the Fourth Schedule to the Constitution such as:</p> <ul style="list-style-type: none"> i. Land planning; ii. Traffic; iii. Transport; iv. Health facilities; v. Sports; vi. Electricity and Gas Reticulation; and vii. Marine navigation.
<p>Urban Areas and Cities (Amendment) Bill, 2017</p> <p>(National)</p>	<p>The Bill proposes some amendments to the Urban Areas and Cities Act, 2011.</p> <p>Some of the proposed amendments include matters that involve the concurrent functions of the National and County Governments under the Fourth Schedule to the Constitution.</p>	<p>The Bill needs to be amended to align it with the Fourth Schedule to the Constitution or to provide a clear link between the functions of the National Government with those of the County Governments.</p>	<p>Amendment of the Bill to align it with the Constitution or to provide a clear link between the functions of the National Government with those of the County Governments.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>The First Schedule classifies urban areas and Cities according to services such as:</p> <ul style="list-style-type: none"> i. Planning and Development Control; ii. Traffic Control and Parking; iii. Water and Sanitation; iv. Street Lighting; v. Public Transport; vi. Storm Drainage; vii. Electricity and Gas Reticulation; viii. Solid waste management; ix. Air pollution; x. Local Distributor Roads; xi. Airports and Airstrips; and xii. Marine Water front. <p>Some of the services listed in the First Schedule require harmonization with the functions of the National Government under Part 1 of the Fourth Schedule to the Constitution such as:</p> <ul style="list-style-type: none"> i. Land planning; ii. Traffic; iii. Transport; iv. Health facilities; v. Sports; vi. Electricity and Gas Reticulation; and vii. Marine navigation. 	<p>The First Schedule should be amended to reflect the concurrent nature of some of the services provided by the County Governments.</p>	<p>The First Schedule should be amended to harmonize the concurrent functions of the National Government and County Governments in the Fourth Schedule to the Constitution such as:</p> <ul style="list-style-type: none"> i. Land planning; ii. Traffic; iii. Transport; iv. Electricity and Gas Reticulation; and v. Marine navigation.
<p>The County Governments Act, 2012 (National)</p>	<p>The Act generally gives effect to Chapter Eleven of the Constitution on Devolved Government and provides for the powers, functions and responsibilities of County Governments to deliver services.</p> <p>The Sections conflict with the Constitution.</p>	<p>The Sections should be amended to comply with the Constitution.</p>	<p>The Act should be amended.</p>
	<p>Section 37 sets out the roles of the County executive committee in urban area or city planning as including:</p> <ul style="list-style-type: none"> i. monitoring of the process 	<p>The Section should be amended to incorporate the roles of the National Government under the Fourth Schedule to the</p>	<p>The Section should be amended to state that the County executive committee shall consult the relevant National</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>of planning, formulation and adoption of the integrated development plan by a city or municipality within the County;</p> <p>ii. assisting a city or municipality with the planning, formulation, adoption and review of its integrated development plan;</p> <p>iii. facilitating the coordination and alignment of integrated development plans of different Cities or Municipalities within the County and with the plans, strategies and programmes of national and County Governments; and</p> <p>iv. Taking appropriate steps to resolve any disputes or differences in connection with the planning, formulation, adoption or review of an integrated development plan.</p> <p>Some roles of the County executive committee as set out under Section 37 conflict with some roles of the National Government as set out in the Fourth Schedule to the Constitution such as land planning.</p> <p>The Section also conflicts with the role of the NLC under Article 67(2)(h) of the Constitution in relation to monitoring and oversight responsibilities over land use planning.</p>	<p>Constitution such as land planning and the role of the NLC in relation to monitoring and oversight responsibilities over land use planning as per Article 67(2)(h) of the Constitution.</p>	<p>Government authorities in exercising its roles relating to planning.</p>
	<p>Section 111 provides for city and municipal plans which shall be the instrument for development facilitation and development control within a city or municipality.</p>	<p>The Section should be amended to incorporate the roles of the National Government under the Fourth Schedule to the Constitution such as land</p>	<p>The Section should be amended to state that the National Government and the NLC shall be consulted in the preparation of city or</p>

Table 19: Matrix Audit for Urban development laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>It states that a city or municipal plan shall provide for:</p> <ul style="list-style-type: none"> i. functions and principles of land use and building plans; ii. location of various types of infrastructure within the city or municipality; iii. development control in the city or municipality within the national housing and building code framework. <p>Some of the matters to be provided for in the city or municipality plan conflict with the roles of the National Government as set out in the Fourth Schedule to the Constitution such as land planning.</p> <p>The Section also conflicts with the role of the NLC under Article 67(2)(h) of the Constitution in relation to monitoring and oversight responsibilities over land use planning.</p>	<p>planning and the role of the NLC in relation to monitoring and oversight responsibilities over land use planning as per Article 67(2)(h) of the Constitution.</p>	<p>municipal plans.</p>
<p>The Physical Planning Act, No. 6 of 1996 (National)</p>	<p>Under the Fourth Schedule of the Constitution, the role of the National Government has been limited to setting the general principles on land planning and co-coordinating of planning by counties. The substantive powers of urban planning have been delegated to the County Government. The National Government has been stripped of the coercive force to ensure compliance with plans developed by the National Government.</p> <p>The Schedule also assigns County planning and development to the County Government. The County Government has been empowered to develop</p>	<p>The entire piece of legislation needs to be amended to rationalize it with the new land laws and omit all references to all classification of land and officers responsible for exercising oversight over land in Kenya.</p> <p>Further, reference to “local authorities” and “the Commissioner of Lands” ought to be streamlined with the new institutional arrangements under the devolved system of governance and the institutions in relation to land in the Constitution.</p>	<p>The Act should be amended to harmonize it with the provisions of the Constitution, especially in relation to the distribution of functions between the National and County Governments.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>County plans and regulate development in the counties. These provisions are a duplication of the powers of the Counties under the Constitution.</p> <p>Under the Constitution, only County Governments have powers to determine matters related to planning. The role of the National Government has been limited to setting general principles on land planning and coordinating planning by counties.</p> <p>The only plans incorporated under the Constitution are plans developed by the County Government or that of its devolved units where specific powers to plan have been assigned.</p> <p>With the designation of the role of planning on County Government, only the County Governments can exercise oversight powers over County planning and development.</p>		
	<p>Section 5 states the functions of the Director of Physical Planning to include:</p> <ul style="list-style-type: none"> (a) formulation of national, regional and local physical development policies, guidelines and strategies; (b) be responsible for the preparation of all regional and local physical development plans; (c) from time to time initiate, undertake or direct studies and research into matters concerning physical planning; 	<p>The provisions of Section 5 of the Act conflict with the function of County Governments in relation to County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 5 should be amended to refer to planning functions of the County Executive Committee member responsible for planning in relation to County planning and separate functions of the National Director of Physical Planning in relation to National planning functions.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>(d) advise the Commissioner of Lands on matters concerning alienation of land under the Government Lands Act (Cap. 280) and the Trust Land Act (Cap. 288) respectively;</p> <p>(e) advise the Commissioner of Lands and local authorities on the most appropriate use of land including land management such as change of user, extension of user, extension of leases, subdivision of land and amalgamation of land; and</p> <p>(f) Require local authorities to ensure the proper execution of physical development control and preservation orders.</p>		
	<p>Sections 5 (a) and (b) refer to regional physical development policies.</p> <p>The Constitution refers to Counties instead of regions.</p>	<p>Sections 5 (a) and (b) should be amended to incorporate the devolved system of government under the Constitution.</p>	<p>Sections 5 (a) and (b) should be amended to refer to “County physical development plan” instead of “regional physical development plan”.</p>
	<p>Sections 5(d) refers to repealed Acts and the office of the Commissioner of Lands, which is not in the Constitution.</p>	<p>Sections 5(d) should be repealed.</p>	<p>Sections 5(d) should be repealed.</p>
	<p>Sections 5(e): conflicts with Article 67(2)(h) of the Constitution which assigns the role of monitoring and oversight responsibilities over land use planning to the NLC.</p>	<p>Sections 5(e) should be amended to incorporate the role of the NLC in relation to monitoring and oversight responsibilities over land use planning as per Article 67(2)(h) of the Constitution.</p>	<p>Section 5(d) should be amended to state that the NLC shall advise the National Government and the County Governments on the most appropriate use of land.</p>
	<p>Section 5 (f): refers to “local authorities”.</p> <p>Local authorities were replaced by County Governments in the Constitution.</p>	<p>The section should be amended to comply with the devolved system of government in the Constitution.</p>	<p>Section 5 (f): should be amended to refer to “County Governments” instead of local authorities.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>Section 8 establishes the National Physical Planning Liaison Committee, Nairobi Physical Planning Liaison Committee, District Physical Planning Liaison Committee and Municipal Physical Planning Liaison Committee respectively.</p> <p>There are no districts in the Constitution.</p>	<p>The section should be amended to comply with the devolved system of government in the Constitution.</p>	<p>The section should be amended to replace the “Nairobi Physical Planning Liaison Committee” and the “District Physical Planning Liaison Committee” with “County Physical Planning Liaison Committees” for the respective Counties.</p>
	<p>Section 16 assigns the role of preparation of a regional physical development plan to the Director of Physical Planning.</p> <p>Section 16 conflicts with Part 2(8) of the Fourth Schedule to the Constitution which assigns the role of County planning and development to the County Governments.</p>	<p>The section should be amended to incorporate the function of County Governments in relation to County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 16 should be amended to refer to the “County physical development plan” instead of “regional physical development plan” and “County Executive Committee member responsible for planning” instead of the “Director of Physical Planning”.</p>
	<p>Section 20: assigns the role of approval of regional physical development plans in relation to counties to the Minister in charge of Physical Planning.</p> <p>Section 20: conflicts with Article 185 of the Constitution which assigns the role of approval of County plans and policies to the County Assemblies.</p>	<p>The section should be amended to incorporate the role of County Assemblies in relation to the approval of County plans and policies to as per Article 185 of the Constitution.</p>	<p>Section 20 should be amended to refer to the “County Assemblies” instead of the “Minister in charge of Physical Planning”.</p>
	<p>Section 24: assigns the role of preparation of local physical development plans in relation to Cities, Municipalities, towns and urban councils to the Director of Physical Planning.</p>	<p>Section 24 should be amended to incorporate the role of the County Governments in relation to County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 24 should be amended to assign the role of preparation of physical development plans in relation to Cities, Municipalities, towns and urban councils to the County Governments.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>This relates to any Government land, trust land or private land within the area of authority of a city, municipal, town or urban council and any trading or marketing centre. It also relates to coordination of development of infrastructural facilities and control of land use and development.</p> <p>Section 24: conflicts with Part 2(8) of the Fourth Schedule to the Constitution which assigns the role of County planning and development to the County Governments.</p>		
	<p>Sections 29-31 assign the role of control of County development to the local authorities.</p> <p>Sections 29-31: conflict with the Fourth Schedule to the Constitution which assigns the role of County planning and development to the County Governments.</p>	<p>Sections 29-31 should be amended to incorporate the role of the County Governments in relation to County planning and development as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 24 should be amended to assign the role of control of County development to the County Governments.</p>
	<p>Section 32 sets out the procedure for approval of development applications.</p> <p>Section 32 conflicts with as per Part 2(8) of the Fourth Schedule to the Constitution which assigns the role of County planning and development to the County Governments.</p> <p>It also does not incorporate the oversight role of the NLC under Article 67(2)(h) of the Constitution in relation to monitoring and oversight responsibilities over land use planning throughout the country.</p>	<p>Section 32 should be amended to incorporate the role of the County Governments in relation to County planning and development and the oversight role of the NLC under Article 67(2)(h) of the Constitution in relation to monitoring and oversight responsibilities over land use planning throughout the country.</p>	<p>Section 32 should be amended to allocate the role of approval of National development applications to the National Government and to allocate the role of approval of County development applications to the County Governments.</p> <p>The section should also be amended to provide for the authorization of the NLC of the development before approval of the National and County development applications.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>Section 41 provides for subdivision of private land within a local authority.</p> <p>Section 41 conflicts with Part 2(8) of the Fourth Schedule to the Constitution which assigns the role of County planning and development to the County Governments.</p> <p>It also does not incorporate the oversight role of the NLC under Article 67(2)(h) of the Constitution in relation to monitoring and oversight responsibilities over land use planning throughout the country.</p>	<p>Section 41 should be amended to comply with Part 2(8) of the Fourth Schedule to the Constitution which assigns the role of County planning and development to the County Governments.</p> <p>It should also be amended to incorporate the oversight role of the NLC under Article 67(2)(h) of the Constitution in relation to monitoring and oversight responsibilities over land use planning throughout the country.</p>	<p>Section 41(2) should be amended to refer to the “County Executive Committee member responsible for planning” instead of the “Director”.</p> <p>Section 41 should also be amended to include authorization of the NLC before approval of an application for subdivision of private land in a County.</p>
	<p>The First Schedule to the Act provides for matters which may be dealt with in a regional physical development plan. These include:</p> <ul style="list-style-type: none"> i. housing; ii. transportation; and iii. electricity supply. <p>The First Schedule to the Act conflicts with some roles of the National Government and County Governments which require harmonization such as:</p> <ul style="list-style-type: none"> a. housing; b. transportation; and c. electricity supply. 	<p>The First Schedule to the Act should be amended to harmonize the concurrent roles of the National Government and County Governments.</p>	
<p>The Physical Planning Bill, 2017 (National)</p>	<p>Sections 9 (d), 12 (c), 13, 17, 18,21,22,23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 41 and 50 do not involve the County Governments.</p> <p>Land planning is a concurrent function under the Fourth Schedule to the Constitution and while the National Government takes the lead in setting out the general</p>	<p>There is need to streamline the roles of the National Government in relation to land planning to the provisions of Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Amendment of the Bill.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>principles and co-ordination of planning, the involvement of the County Governments is a critical requirement in the exercise.</p>		
	<p>Section 13 (b) assigns the role of approving County physical development plans to the County Executive Committee Member responsible for physical planning.</p> <p>This contravenes Article 185 of the Constitution which assigns the role of approval of County plans and policies to the County Assembly.</p>	<p>Section 13 (b) should be deleted.</p>	<p>Section 13 (b) should be deleted.</p>
	<p>Section 33 proposes the objects of a County physical development plan as including:</p> <ul style="list-style-type: none"> i. Provision of a basis for infrastructure and services delivery; ii. Guidance on the use and management of natural resources; iii. Enhancement of environmental protection and conservation; and iv. Improvement of transport and communication networks and linkages. <p>The objects of a County physical development plan proposed in Section 33 cover some functions of the National Government in the Fourth Schedule to the Constitution that require harmonization with similar County Government functions such as:</p> <ul style="list-style-type: none"> i. Protection of the environment and natural resources; and ii. Transport. 	<p>Section 33 should be amended to incorporate the distribution of roles of the National Government and County Governments in relation to County physical development plans as per the Fourth Schedule to the Constitution.</p>	<p>Section 33 should include a sub-section stating that the objects of a County physical development plan shall be aligned with the distribution of roles of the National Government and County Governments in the Fourth Schedule to the Constitution.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>Section 41 sets out the purpose of a local physical development plan as including:</p> <ul style="list-style-type: none"> i. Zoning, urban renewal or redevelopment; ii. Guiding and coordinating the development of infrastructure; iii. Regulation of land use and land development; and iv. Providing a framework and guidelines on building and works development in the city, municipality, urban area, etc. <p>The purpose of a local physical development plan in Section 41 covers some functions of the National Government and County Governments in the Fourth Schedule to the Constitution that require harmonization such as:</p> <ul style="list-style-type: none"> i. Land planning; and ii. Transport. 	<p>Section 41 should be amended to take into consideration the distribution of roles of the National Government and County Governments in the preparation of local physical development plans in the Fourth Schedule to the Constitution.</p>	<p>Section 41 should be amended to include a sub-section stating that in the preparation of a local physical development plan, a County Government shall consider the distribution of roles of the National Government and County Governments in the Fourth Schedule to the Constitution.</p>
	<p>Section 50 proposes giving of powers in relation to development to the Cabinet Secretary in charge of physical planning and the County Executive Committee Member responsible for physical planning (the “planning authorities”). These include:</p> <ul style="list-style-type: none"> i. Control of land use and development; ii. Control of subdivision; iii. Approval of development applications; iv. Ensuring the proper execution and implementation of approved physical development plans; and v. Reservation and maintenance of all the land planned for open spaces, parks, urban forests and green belts in 	<p>Section 50 should be amended to harmonize the concurrent functions of the National Government and County Governments such as land planning in the Fourth Schedule to the Constitution.</p>	<p>The functions stipulated in the Section need to be harmonized with those set out in the Fourth Schedule to the Constitution.</p> <p>Additionally, a sub-section should be included in the Section to state that the planning authorities shall take into consideration the distribution of roles of the National Government and County Governments in the Fourth Schedule to the Constitution in the exercise of their powers.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>accordance with the approved physical development plans.</p> <p>Section 50 covers some concurrent functions of the National Government and County Governments in the Fourth Schedule to the Constitution that require harmonization such as land planning.</p>		
<p>The Sectional Properties Act</p>	<p>The Act does not generally incorporate the devolved system of government.</p> <p>The following sections of the Act refer to “local authority” instead of “County Government”:</p> <ul style="list-style-type: none"> i. Section 3 ii. Section 9(3) iii. Section 11(1)(b) iv. Section 11(3) v. Section 12(1) vi. Section 20(1)(f) vii. Section 29(6) viii. Section 32(2)(b) ix. Section 33(1)(b) x. Section 39(1)(e) xi. Section 63 <p>Local authorities are not incorporated under the Constitution.</p>	<p>The sections should be amended to refer to the County Governments instead of local authorities, in conformity with the devolved system of government under the Constitution.</p>	<p>The following amendments:</p> <ul style="list-style-type: none"> i. Section 3: delete the definition of “local authority” and replace with: <ul style="list-style-type: none"> “County Government” means a County Government established under Article 176(1) of the Constitution.” ii. Section 9(3) amend to state: <ul style="list-style-type: none"> “The Registrar shall, within twenty-one days from the day a sectional plan is registered, submit to the County Government of the area in which the parcel is located, a copy of the registered sectional plan.” iii. Section 11(1)(b) amend to state: <ul style="list-style-type: none"> “a certificate of the County Government stating that the proposed division of the structure as illustrated on the plan has been approved by the County Government.”

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
			<p>iv. Section 11(3) amend to state: <i>“If an application is made for a certificate under subsection (1)(b) the County Government —”</i></p> <p>v. Section 12(1) amend to state: <i>“Any proprietor may with the approval of the County Government, sub-divide or consolidate his unit by registering a sectional plan relating to the unit intended to be so sub-divided or consolidated in the manner provided by this Act for the registration of sectional plans.”</i></p> <p>vi. Section 20(1)(f) amend to state: <i>“comply with any notice or order duly served on it by any competent County Government or public body requiring repairs to, or work to be performed in respect of, the land or any building or improvements thereon;”</i></p> <p>vii. Section 29(6) amend to state: <i>“A County Government, a judgment creditor of the Corporation for an amount of not less than five thousand shillings or any owner or person having a</i></p>

Name of policy/law	Issue	Rationale/concern	Recommendation
			<p>registered interest in or over the units comprised in a sectional plan may apply to the tribunal for the appointment of a receiver and manager upon such terms as the tribunal may direct.”</p> <p>viii. Section 33(1)(b) amend to state: “as required by a County Government or other public authority, in respect of the unit or common property that is leased to that owner under section 42.”</p> <p>ix. Section 32(2)(b) amend to state: “to comply with notices or orders by any County Government or public authority requiring repairs to or work to be done in respect of the parcel.”</p> <p>x. Section 39(1)(e) amend to state: “all certificates, approvals and permits issued by a County Government, the National Government or an agent of the National Government which relate to any property for which the Corporation is responsible.”</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
			<p>xi. Section 63 amend to state: <i>“When a County Government, public authority or person authorized by either of them has a statutory right to enter on any part of a parcel, the authority or person is entitled to enter on any other part of the parcel to the extent necessary or expedient to enable it or him to exercise its or his statutory powers.”</i></p>
	<p>Section 3 of the Act refers to the Registered Land Act (Cap. 300).</p> <p>The Act was repealed by the Land Registration Act.</p>	<p>The section should be amended to refer to the Land Registration Act.</p>	<p>Section 3 of the Act should be amended to state: <i>““Registrar” means a Registrar appointed under the Land Registration Act No. 3 of 2012.”</i></p>
	<p>Section 3 and Section 71 of the Act refer to “Minister”.</p> <p>Ministers are not incorporated under the Constitution.</p>	<p>The sections should be amended to refer to “Cabinet Secretary” instead of “Minister”.</p>	<p>Section 3 of the Act should be amended to state: <i>““Cabinet Secretary” means the Cabinet Secretary for the time being responsible for matters relating to Land.”</i></p> <p>Section 71 of the Act should be amended to state: <i>“The Cabinet Secretary may make regulations—”</i></p>
	<p>Section 3 of the Act defines “title document” as a document indicating title to a unit which is registerable under the Registered Land Act.</p> <p>The Act was repealed by the Land Registration Act.</p>	<p>The section should be amended to refer to the Land Registration Act.</p>	<p>Section 3 of the Act should be amended to state: <i>““title document” means a document indicating title to a unit which is registerable under the Land Registration Act No. 3 of 2012.”</i></p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>Section 5(5) and 5(6) of the Act state:</p> <p><i>“(5) Notwithstanding any other written law, as soon as a sectional plan is registered under this Act the title to a unit comprised in the plan shall, with effect from the date of the registration of the sectional plan, be deemed to be issued under the Registered Land Act.</i></p> <p><i>(6) After a register for a unit is opened pursuant to subsection (1) the unit may devolve or be transferred, leased, charged or otherwise dealt with in the same manner and form as land held under the Registered Land Act and the provisions of that Act shall apply to those dealings in so far as those provisions do not conflict with this Act or regulations made thereunder.”</i></p>	<p>The sub-sections should be amended to refer to the Land Registration Act.</p>	<p>The sub-sections should be amended to state:</p> <p><i>“(5) Notwithstanding any other written law, as soon as a sectional plan is registered under this Act the title to a unit comprised in the plan shall, with effect from the date of the registration of the sectional plan, be deemed to be issued under the Land Registration Act No. 3 of 2012.</i></p> <p><i>(6) After a register for a unit is opened pursuant to subsection (1) the unit may devolve or be transferred, leased, charged or otherwise dealt with in the same manner and form as land held under the Land Registration Act No. 3 of 2012 and the provisions of that Act shall apply to those dealings in so far as those provisions do not conflict with this Act or regulations made thereunder.”</i></p>
	<p>Section 11(4) of the Act refers to the Land Planning Act (Cap. 303) and Town Planning Act (Cap. 134 of 1948).</p> <p>The Acts were repealed by the Physical Planning Act.</p>	<p>The section should be amended to refer to the Physical Planning Act.</p>	<p>Section 11(4) of the Act should be amended to state:</p> <p><i>“The provisions of the Physical Planning Act relating to the sub-division of land do not apply to the division of a building under a sectional plan if—</i></p> <p><i>(a) the surface boundaries of the parcel as defined in this Act on which that building is located correspond to the boundaries of a parcel as defined in the Physical Planning Act; and</i></p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
			<i>(b) the building located on the parcel contains two or more units.”</i>
<p>The Environmental Management and Co-ordination Act 1999 (National)</p>	<p>Section 9(1) states that the National Environment Management Authority (NEMA) shall be the principal instrument of Government in the implementation of all policies relating to the environment.</p> <p>Section 9(1) conflicts with Part 2(10) of the Fourth Schedule to the Constitution which distributes the function of implementation of specific National Government policies on natural resources and environmental conservation to the County Governments.</p>	<p>Section 9(1) should be amended to incorporate the function of County Governments in relation to implementation of specific National Government policies on natural resources and environmental conservation as per Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Section 9(1) should be amended to state that (NEMA) shall implement the policies relating to the environment in partnership with the County Governments.</p>
	<p>Section 9(2)(s) sets out the functions of NEMA as including performance of such other functions as the Government may assign to NEMA or as are incidental or conducive to the exercise by NEMA of any or all the functions provided under the Act.</p> <p>Section 9(2)(s) does not incorporate the function of County Governments in relation to implementation of specific National Government policies on natural resources and environmental conservation as stated in Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Section 9(2)(s) should be amended to incorporate the function of County Governments in relation to implementation of specific National Government policies on natural resources and environmental conservation as per Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Section 9(2)(s) should be amended to state that NEMA shall, in partnership with the County Governments, perform such other functions as the National Government may assign to it or as are incidental or conducive to the exercise by NEMA of any or all of the functions provided under the Act, in relation to the implementation of specific National Government policies on natural resources and environmental conservation.</p>
	<p>Section 12 gives NEMA the power to direct lead agencies to perform their duties under the Act.</p> <p>Section 12 does not incorporate the function of County Governments in</p>	<p>Section 12 should be amended to incorporate the function of County Governments in relation to implementation of specific National Government policies on natural resources and</p>	<p>Section 12 should be amended to state that NEMA shall have the power to direct lead agencies to perform their duties under the Act, other than duties relating to the function of County</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	relation to implementation of specific National Government policies on natural resources and environmental conservation as stated in Part 2(10) of the Fourth Schedule to the Constitution.	environmental conservation as per Part 2(10) of the Fourth Schedule to the Constitution.	Governments in relation to implementation of specific National Government policies on natural resources and environmental conservation as stated in the Fourth Schedule to the Constitution , which shall be carried out in partnership with NEMA.
	Section 30 states that the functions of a County Environment Committee of the County shall include: <ul style="list-style-type: none"> i. responsibility for the proper management of the environment within the County for which it is appointed; and ii. Development of a County strategic environmental action plan every five (5) years. 	Section 30 should be amended to incorporate the function of County Governments in relation to implementation of specific National Government policies on natural resources and environmental conservation.	Section 30 should be amended to state that the functions of a County Environment Committee of the County shall include: <ul style="list-style-type: none"> i. responsibility for the proper management of the environment within the County for which it is appointed; and ii. development of a County strategic environmental action plan every five (5) years,
	Section 30 does not incorporate the function of County Governments in relation to implementation of specific National Government policies on natural resources and environmental conservation as stated in Part 2(10) of the Fourth Schedule to the Constitution.		which functions shall be performed in relation to the County Government function of implementation of specific National Government policies on natural resources and environmental conservation as stated in Part 2(10) of the Fourth Schedule to the Constitution.
	Section 40 states that every County Environment Committee shall prepare a County Environment Action Plan in respect of the County for consideration and adoption by the County Assembly. Section 40 does not	Section 40 should be amended to incorporate the function of County Governments in relation to implementation of specific National Government policies on natural resources and environmental conservation.	Section 40 should be amended to state that every County Environment Committee shall prepare a County Environment Action Plan in respect of the County for consideration and adoption by the County Assembly in relation to

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>incorporate the function of County Governments in relation to implementation of specific National Government policies on natural resources and environmental conservation as stated in Part 2(10) of the Fourth Schedule to the Constitution.</p>		<p>the County Government function of implementation of specific National Government policies on natural resources and environmental conservation as stated in Part 2(10) of the Fourth Schedule to the Constitution.</p>
<p>The Valuation for Rating Act, Cap 266 (National)</p>	<p>Section 3, 4, 9, 10, 11 and 22 conflict with the Constitution.</p> <p>Section 3 empowers the local authority to cause a valuation to be made of every ratable property within the area of the <i>local authority</i>.</p> <p>Section 4 provides for powers of <i>local authorities</i> to amend valuation roll.</p> <p>Sections 9, 10 and 11 provides for the procedure for preparation of the valuation roll by the <i>local authority</i>.</p> <p>Section 22 provides the powers of the <i>local authority</i> to alter valuation roll.</p> <p>Under the new Constitutional dispensation, local authorities have been phased out with the introduction of the devolved system of governance.</p> <p>Further, with the allocation of County planning on County Government, local authorities (defunct) have no Constitutional basis to rate properties in the County.</p> <p>The function given to local authorities under the Act have now been designated under the jurisdiction of the County Governments.</p>	<p>There is need to repeal the Statute in totality and align its provisions with the devolved system of governance and in that regard with the division of functions under the Fourth Schedule to the Constitution and Article 209(3) of the Constitution which states that a County may impose property rates.</p>	<p>Repeal of the Statute.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
<p>The Land Value Index Laws (Amendment) Bill, 2018</p> <p>(National)</p>	<p>Section 6 proposes the introduction of Section 107A to the Land Act which will give the National Government the power to determine the land value index for valuation of freehold land and community land that is subject to compulsory acquisition.</p> <p>This is part of the land planning functions which require harmonization under the Fourth Schedule to the Constitution.</p>	<p>Section 6 should be amended to harmonize the concurrent function of National Government and County Governments under Part 1(21) and Part 2(8) of the Fourth Schedule to the Constitution in relation to land planning.</p>	<p>Amendment of the section to include consultation of the NLC and the County Governments in determination of the land value index for valuation of freehold land and community land that is subject to compulsory acquisition.</p>
<p>The Housing Act</p> <p>(National)</p>	<p>The Act does not take into consideration the devolved system of government in the Constitution. It still refers to local authorities, whose mandate was taken over by the County Governments.</p> <p>The Act does not incorporate the role of the NLC in acquisition of land on behalf of the National Government and the County Governments as part of its mandate in Article 67(2)(a) of the Constitution of management of public land on behalf of the National and County Governments.</p> <p>It also does not incorporate the role of the County Governments in relation to housing as part of County planning and development as per Part 2(8) of the Fourth Schedule to Constitution.</p>	<p>The sections of the Act referring to “local authorities” should be amended to refer to “County Governments” to comply with the Constitution.</p> <p>The Act should also be amended to incorporate the role of the NLC as per Article 67(2)(a) of the Constitution and the role of the County Governments as per Part 2(8) of the Fourth Schedule to Constitution.</p>	<p>Amendment of the Act to address Constitutional matters relating to devolution and urban planning and development.</p>
	<p>Section 7 of the Act states that the National Housing Corporation (“the Corporation”) may, among other things, perform the following functions from the Housing Fund:</p>	<p>Section 7 of the Act should be amended to incorporate County Governments as per the devolved system of government under the Constitution.</p>	<p>Section 7 should be amended to state that the National Housing Corporation may, among other things, perform the following functions from the Housing Fund,</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>i. lend or grant money to any local authority, for the purpose of enabling the authority to exercise any of the powers conferred upon it by the Act;</p> <p>ii. construct dwellings, carry out approved schemes and lay out and provide services for approved schemes; and</p> <p>iii. acquire any land or building, or estate or interest therein, for any of the purposes of the Act.</p> <p>Section 7 refers to “<i>local authorities</i>”, which are not recognized in the devolved system of government in the Constitution.</p> <p>The section does not incorporate the role of the NLC in Article 67(2)(a) of the Constitution in relation to the management of public land on behalf of the National and County Governments.</p> <p>It also does not incorporate the function of the County Governments in relation to housing as part of County planning and development, as stated in Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>It should also be amended to incorporate the role of the NLC in relation to the management of public land on behalf of the National and County Governments as per Article 67(2)(a) of the Constitution and the function of the County Governments in relation to housing as part of County planning and development, as stated in Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>in consultation with the NLC and the relevant County Governments:</p> <p>i. lend or grant money to any County Government, for the purpose of enabling the County Government to exercise any of the powers conferred upon it by the Act;</p> <p>ii. construct dwellings, carry out approved schemes and lay out and provide services for approved schemes; and</p> <p>iii. acquire any land or building, or estate or interest therein, for any of the purposes of the Act.</p>
<p>The Housing (Amendment) Bill, 2017</p> <p>(National)</p>	<p>The Bill proposes amendments in relation to low cost housing.</p> <p>It does solve the constitutional matters relating to devolution and urban planning and development that need to be addressed in the Principal Act such as:</p> <p>i. Amendment of the Act to incorporate the County Governments in place of local authorities as per the devolved system of government under the Constitution.</p>	<p>Revision of the Bill to address Constitutional matters in the Principal Act.</p>	<p>Revision of the Bill in relation to Constitutional matters of devolution and urban planning and development in the Principal Act such as:</p> <p>i. Amendment of the Act to incorporate the County Governments in place of local authorities as per the devolved system of government under the Constitution.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>ii. Amendment of the Act to incorporate the role of the NLC in the management of public land on behalf of the National and County Governments as per Article 67(2)(a) of the Constitution; and</p> <p>iii. Amendment of the Act to incorporate the function of the County Governments in relation to housing as part of County planning and development, as stated in Part 2(10) of the Fourth Schedule to the Constitution.</p>		<p>iii. Amendment of the Act to incorporate the role of the NLC in the management of public land on behalf of the National and County Governments as per Article 67(2)(a) of the Constitution; and</p> <p>iv. Amendment of the Act to incorporate the function of the County Governments in relation to housing as part of County planning and development, as stated in Part 2(10) of the Fourth Schedule to the Constitution.</p>
<p>The Land Control Act</p>	<p>The Act does not take into consideration the devolved system of government in the Constitution. It still refers to “local authorities” and “provinces”, which were dispensed with in the Constitution.</p> <p>The Act does not incorporate the role of the NLC as per Article 67(2)(h) of the Constitution in relation to monitoring and having oversight responsibilities over land use planning throughout the country.</p> <p>It also does not incorporate the role of the County Governments in relation to housing as part of County planning and development under the Constitution as per Part 2(8) of the Fourth Schedule to the Constitution.</p> <p>Section 8 of the Act sets out the procedure for application for consent in respect of a controlled transaction.</p>	<p>The Act is outdated and does not incorporate the current institutional framework for land control as envisaged in the Constitution, which now involves the NLC and the County Governments.</p>	<p>Repeal of the Act in its entirety.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>The procedure in the section does not incorporate the role of the NLC in Article 67(2)(h) of the Constitution in relation to its function of monitoring and having oversight responsibilities over land use planning throughout the country.</p> <p>It also does not incorporate the role of the County Governments in relation to housing as part of County planning and development in Part 2(8) of the Fourth Schedule to the Constitution.</p>		
	<p>Section 10 establishes provincial land control appeals boards.</p> <p>There are no provinces under the Constitution.</p> <p>Section 12 establishes the Central land control appeals board and states that the Commissioner of Lands shall be the secretary of the board.</p> <p>There is no office of the Commissioner of Lands under the Constitution.</p> <p>Section 23 states that the President may, by notice in the Kenya Gazette, prohibit any controlled transaction or any class of controlled transaction.</p> <p>Section 24 states that the President may, by notice in the Kenya Gazette, make certain exemptions in relation to the Act.</p> <p>The President does not have any powers in relation to land control under the Constitution.</p>		

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>The First Schedule to the Act provides for the composition of the boards established under the Act.</p> <p>The Schedule refers to offices which are not in the Constitution such as the District Commissioner and the Provincial Commissioner.</p>		
<p>The Kenya Roads Act (National)</p>	<p>The Act does not take into consideration the devolved system of government in the Constitution. It still refers to local authorities, which were dispensed with in the Constitution.</p> <p>Generally, the Act does not incorporate the role of County Governments in relation to road transport as per Part 2(5) of the Fourth Schedule to the Constitution.</p> <p>Section 6 establishes the Kenya Rural Roads Authority (KeRRA).</p> <p>Section 7 gives KeRRA the responsibility of the management, development, rehabilitation and maintenance of rural roads.</p> <p>Rural roads fall within the jurisdiction of both the National Government and the County Governments. Therefore, the mandate of KeRRA should be carried out in collaboration with the County Governments in line with their function of County transport in Part 2(5) of the Fourth Schedule to the Constitution.</p>	<p>Repeal of the Act and enactment of a new Act that addresses the Constitutional matters relating to devolution and road transport.</p>	<p>Repeal of the Act.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>Section 9 establishes KURA.</p> <p>Section 10 gives KURA the responsibility of the management, development, rehabilitation and maintenance of all public roads in the Cities and Municipalities in Kenya except where those roads are national roads.</p> <p>This conflicts with the Fourth Schedule to the Constitution which gives the mandate of County roads to the County Governments, because Cities and Municipalities are also within the jurisdiction of County Governments. Therefore, the establishment of KURA is a duplication of the role of the County Governments in relation to road transport.</p> <p>Section 23 of the Act provides for acquisition of land by an Authority under the Act.</p> <p>It refers to the office of the Commissioner of Lands, which is not under the Constitution.</p> <p>It also does not incorporate the role of the NLC in Article 67(2)(a) of the Constitution in relation to management of public land on behalf of the national and County Governments.</p>		
<p>The Kenya Roads Bill (National)</p>	<p>The Bill proposes provisions for the classification, management construction and maintenance of public roads, establishment of Kenya National Highways Authority (KeNHA) and Kenya National Secondary Roads Authority (KeNSRA) and their functions and powers.</p>	-	<p>The Bill addresses the main challenges of the Principal Act.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>It adheres to the devolved system of government in the Constitution and the role of County Governments in relation to road transport as per Part 2(5) of the Fourth Schedule to the Constitution.</p> <p>Section 12 and Section 18 of the Bill propose the establishment of KeNHA and KeNSRA for the maintenance of primary and secondary National Trunk Roads respectively.</p> <p>Section 47 provides for the acquisition of land by the authorities under the Act in consultation with the NLC.</p> <p>Section 101 of the Bill proposes the establishment of establish a County Roads Agency by each County Government, which shall be responsible for the management, development and maintenance of County Roads under the County Executive in charge of roads.</p>		
<p>The Energy Act (National)</p>	<p>The Act does not incorporate the distribution of functions between the National Government and the County Governments as per the Fourth Schedule to the Constitution, especially in relation to electricity and gas reticulation and energy regulation.</p>	<p>The Sections should be amended to harmonize the functions between the National Government and the County Governments.</p>	<p>Amendment of the Act.</p>
	<p>Section 4 of the Act establishes the Energy Regulatory Commission (the “ERC”).</p> <p>Section 5 states that the objectives and functions of the ERC shall include:</p>	<p>Section 5 of the Act should be amended to harmonize the function of energy regulation between the National Government and the County Governments as per Part 1(31) and Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 5 of the Act should be amended to state that the ERC’s functions of energy regulation in counties shall be carried out in consultation with the relevant County Governments.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>i. generation, importation, exportation, transmission, distribution, supply and use of electrical energy;</p> <p>ii. importation, refining, exportation, transportation, storage and sale of petroleum and petroleum products; and</p> <p>iii. production, distribution, supply and use of renewable energy.</p> <p>Section 5 contravenes Part 1(31) and Part 2(8) of the Fourth Schedule to the Constitution which distribute energy regulation as a concurrent function of the National Government and County Governments.</p>		
	<p>Section 6 of the Act gives the ERC power to, among other things:</p> <p>i. issue, renew, modify, suspend or revoke licenses and permits for all undertakings and activities in the energy sector;</p> <p>ii. set, review and adjust electric power tariffs and tariff structures and investigate tariff charges, whether or not a specific application has been made for a tariff adjustment; and</p> <p>iii. approve electric power purchase and network service contracts for all persons engaging in electric power undertakings.</p> <p>Section 6 of the Act gives the ERC powers that are in relation to energy regulation. According to Part 1(31) and Part 2(8) of the Fourth Schedule to the Constitution, energy regulation is a concurrent function of the National Government and County Governments.</p>	<p>Section 6 of the Act should be amended to incorporate the role of County Governments in relation to energy regulation as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 6 of the Act should be amended to state that the ERC's powers in relation to energy regulation in counties shall be carried out in consultation with the relevant County Governments.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>Section 27 of the Act states that a person who wishes to carry out the transmission, distribution and supply of electricity must apply for a license to the ERC.</p> <p>The issuing of a license by ERC for the transmission, distribution and supply of electricity conflicts with the function of the County Governments relating to electricity reticulation and energy regulation in Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 27 of the Act should be amended to incorporate the function of the County Governments relating to electricity reticulation and energy regulation Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>The Section should be amended to state that the ERC shall issue licenses for the transmission, distribution and supply of electricity in consultation with the relevant County Governments.</p>
	<p>Section 28 of the Act sets out the procedure for application for an electricity licence or permit.</p> <p>The section does not provide for the involvement of County Governments in the issuance of electricity licenses and permits. This contravenes Part 1(31) and Part 2(8) of the Fourth Schedule to the Constitution which distributes energy regulation as a concurrent function of the National Government and County Governments.</p>	<p>Section 28 of the Act should be amended to incorporate the role of County Governments in relation to energy regulation as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 28 of the Act should be amended to state that the ERC's functions of energy regulation in relation to issuance of electricity licenses and permits in counties shall be carried out in consultation with the relevant County Governments.</p>
	<p>Section 33 of the Act states that a licensee or permit holder shall not purchase or acquire any undertaking or associate himself with any public or local authority, company, person or body of persons supplying electrical energy under any licence, except with the authority of the ERC.</p>	<p>Section 33 of the Act should be amended to incorporate the function of the County Governments relating to energy regulation as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>The Section should be amended to state that the licensee shall not purchase or acquire any undertaking or associate himself with any public or local authority, company, person or body of persons supplying electrical energy under any licence, except with the authority of the ERC,</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>The requirement for consent of the ERC conflicts with the function of the County Governments relating to energy regulation in Part 2(8) of the Fourth Schedule to the Constitution.</p>		<p>except with the consent of the ERC in consultation with the relevant County Government, which consent shall not be unreasonably withheld.</p>
	<p>Section 34 of the Act states that a licensee or permit holder shall not transfer or otherwise divest any rights, powers or obligations conferred or imposed upon him by the license without the consent of the ERC.</p> <p>The requirement for consent of the ERC conflicts with the function of the County Governments relating to energy regulation in Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 34 of the Act should be amended to incorporate the function of the County Governments relating to energy regulation as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 34 of the Act should be amended to state that the licensee or permit holder shall not transfer or otherwise divest any rights, powers or obligations conferred or imposed upon him by the license without the consent of the ERC in consultation with the relevant County Government.</p>
	<p>Section 43 of the Act states that all contracts for the sale of electrical energy, transmission or distribution services, between and among licensees, and between licensees and large retail consumers shall be submitted to the ERC for approval before execution.</p> <p>The requirement for submission of all contracts for the sale of electrical energy, transmission or distribution services, between and among licensees, and between licensees and large retail consumers to the ERC, conflicts with the function of the County Governments relating to electricity reticulation and energy regulation as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 43 of the Act should be amended to incorporate the function of the County Governments relating to electricity reticulation and energy regulation as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 43 of the Act should be amended to state that all contracts for the sale of electrical energy, transmission or distribution services, between and among licensees, and between licensees and large retail consumers shall be submitted to the ERC for approval in consultation with the relevant County Government before execution.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>Section 54 of the Act provides for compulsory acquisition of land for purposes of a licence.</p> <p>The section contravenes Article 67(2)(a) of the Constitution which states that the NLC shall carry out the function of management of public land on behalf of the National Government and the County Governments.</p>	<p>Section 54 of the Act should be amended to incorporate the role of the NLC in compulsory acquisition as per Article 67(2)(a) of the Constitution.</p>	<p>Section 54 of the Act should be amended to state that compulsory acquisition of land under the Act shall be carried out in consultation with the NLC.</p>
	<p>Section 66 of the Act establishes the Rural Electrification and Renewable Energy Corporation (“REREC”).</p> <p>Under Section 67, the functions of REREC include, among other things:</p> <ol style="list-style-type: none"> i. overseeing the implementation of the Rural Electrification Programme; and ii. Developing and updating the rural electrification master plan. <p>The functions of REREC conflict with the function of the County Governments relating to electricity reticulation and energy regulation in Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 67 of the Act should be amended to incorporate the function of the County Governments relating to electricity reticulation and energy regulation as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>The Section needs to be amended to ensure that REREC’s proposed mandate of electricity reticulation in rural areas remains that of the County Governments.</p>
<p>The Energy Bill, 2017 (National)</p>	<p>Sections 10(a), 11, 43, 145, 151(1), 152(1), 165, 169, 173 (3), 174 (1), 191(1), 192 and Part B of the Fifth Schedule to the Bill conflict with the Constitution, especially in relation to the distribution of functions between the National Government and County Governments in the Part 1(31) and Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>The Sections should be amended to harmonize the functions between the National Government and County Governments.</p>	<p>Amendment of the Bill.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>Section 9 of the Bill proposes the establishment of the Energy Regulatory Commission (the “ERC”).</p> <p>Under Section 10 (a), the ERC shall carry out energy regulation functions which include:</p> <ul style="list-style-type: none"> i. generation, importation, exportation, transmission, distribution, supply and use of electrical energy; ii. importation, refining, exportation, transportation, storage and sale of petroleum and petroleum products with the exception of crude oil; iii. production, conversion, distribution, supply, marketing and use of renewable energy; and iv. Exploration, extraction, production, processing, transportation, storage exportation, importation and sale of coal bed methane gas and other energy forms. <p>Energy regulation is stated as a function of the National Government in Part 1(31) of the Fourth Schedule to the Constitution. However, it is also stated as a function of the County Governments as part of County planning and development in Part 2(8) of the Fourth Schedule to the Constitution.</p> <p>Therefore, the function of energy regulation in counties by the ERC should be carried out in consultation with the relevant County Governments.</p>	<p>Section 10(a) of the Bill should be amended to harmonize the function of energy regulation between the National Government and the County Governments as per Part 1(31) and Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 10(a) of the Bill should be amended to state that the ERC’s functions of energy regulation in counties shall be carried out in consultation with the relevant County Governments.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>Section 11 of the Bill gives the ERC power to, among other things:</p> <ul style="list-style-type: none"> i. issue, renew, modify, suspend or revoke licenses and permits for all undertakings and activities in the energy sector; ii. set, review and approve contracts, tariffs and charges for common user petroleum logistics facilities and petroleum products; iii. set, review and adjust electric power tariffs and tariff structures and investigate tariff charges, whether or not a specific application has been made for a tariff adjustment; and iv. approve electric power purchase and network service contracts for all persons engaging in electric power undertakings. <p>Section 11 of the Bill gives the ERC powers that are in relation to energy regulation. Energy regulation is stated as a function of the National Government in Part 1(31) of the Fourth Schedule to the Constitution. However, it is also stated as a function of the County Governments as part of County planning and development in Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 11 of the Bill should be amended to incorporate the role of County Governments in relation to energy regulation as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 11 of the Bill should be amended to state that the ERC's functions of energy regulation in counties shall be carried out in consultation with the relevant County Governments.</p>
	<p>Section 42 of the Bill proposes the establishment of the Rural Electrification and Renewable Energy Corporation ("REREC").</p> <p>Under Section 43, the functions of REREC shall include, among other things:</p>	<p>Section 42 of the Bill should be amended to incorporate the function of the County Governments relating to electricity reticulation and energy regulation as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>The Section needs to be amended to ensure that REREC's proposed mandate of electricity reticulation in rural areas remains that of the County Governments.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>iii. overseeing the implementation of the Rural Electrification Programme; and</p> <p>iv. Developing and updating the rural electrification master plans in consultation with County Governments.</p> <p>The functions of RREC conflict with the function of the County Governments relating to electricity reticulation and energy regulation in Part 2(8) of the Fourth Schedule to the Constitution.</p>		
	<p>Section 145 of the Bill states that a person who wishes to carry out the transmission, distribution and retail supply of electricity must apply for a license to the ERC.</p> <p>The issuing of a license by ERC for the transmission, distribution and retail supply of electricity conflicts with the function of the County Governments relating to electricity reticulation and energy regulation in Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 145 of the Bill should be amended to incorporate the function of the County Governments relating to electricity reticulation and energy regulation as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>The Section should be amended to state that the ERC shall issue licenses for the transmission, distribution and retail supply of electricity in consultation with the relevant County Governments.</p>
	<p>Section 151(1) of the Bill states that a licensee shall not purchase or acquire any undertaking of any public authority, person or body of persons supplying electrical energy under any license, except with the consent of the ERC, which consent shall not be unreasonably withheld.</p> <p>The requirement for consent of the ERC by a licensee before purchasing or acquiring any undertaking of any public authority, person or body of</p>	<p>Section 151(1) of the Bill should be amended to incorporate the function of the County Governments relating to energy regulation as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>The Section should be amended to state that the licensee shall not purchase or acquire any undertaking of any public authority, person or body of persons supplying electrical energy under any license, except with the consent of the ERC in consultation with the relevant County Government, which consent shall not be unreasonably withheld.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>persons supplying electrical energy conflicts with the function of the County Governments relating to energy regulation in Part 2(8) of the Fourth Schedule to the Constitution.</p>		
	<p>Section 152(1) of the Bill states that a licensee shall not transfer or otherwise divest any rights, powers or obligations conferred or imposed upon him by the license without the consent of the ERC.</p> <p>The requirement for consent of the ERC by a licensee before transferring or otherwise divesting any rights, powers or obligations conferred or imposed upon him by the license conflicts with the function of the County Governments relating to energy regulation in Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 152(1) of the Bill should be amended to incorporate the function of the County Governments relating to energy regulation as per Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 152(1) of the Bill should be amended to state that the licensee shall not transfer or otherwise divest any rights, powers or obligations conferred or imposed upon him by the license without the consent of the ERC in consultation with the relevant County Government.</p>
	<p>Section 165 and 169 of the Bill state that a transmission Licensee and a distribution Licensee shall, respectively, collect, analyze and maintain such data, information and statistics relating to his undertaking to enable him monitor and report to the ERC on the reliability and quality of supply as well as quality of service.</p> <p>The requirement for a Licensee to collect, analyze and maintain such data, information and statistics relating to his undertaking to enable him monitor and report to the ERC on the reliability and quality of supply as well as quality of service conflicts</p>	<p>Section 165 and 169 of the Bill should be amended to incorporate the function of the County Governments relating to energy regulation Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>The Sections should be amended to state that a Licensee shall collect, analyze and maintain such data, information and statistics relating to his undertaking to enable him monitor and report to the ERC and the relevant County Government on the reliability and quality of supply as well as quality of service.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	with the function of the County Governments relating to energy regulation in Part 2(8) of the Fourth Schedule to the Constitution.		
	<p>Section 173(3) of the Bill states that a person issued with a retail license shall discharge such duties, in relation to the supply and trade in electrical energy as may be specified by the ERC.</p> <p>The requirement for a person issued with a retail license to discharge such duties, in relation to the supply and trade in electrical energy as may be specified by the ERC conflicts with the function of the County Governments relating to energy regulation in Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 173(3) of the Bill should be amended to take into consideration the function of the County Governments relating to energy regulation Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 173(3) of the Bill should be amended to state that a person issued with a retail license shall discharge such duties, in relation to the supply and trade in electrical energy as may be specified by the ERC and the relevant County Government.</p>
	<p>Section 174(1) of the Bill states that the ERC may issue a retail license to a licensee for the supply of electricity for a particular area or areas stated in the license.</p> <p>The power of the ERC to issue a retail license to a licensee for the supply of electricity conflicts with the function of the County Governments relating to energy regulation in Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 174(1) of the Bill should be amended to incorporate the function of the County Governments relating to energy regulation Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>The Section should be amended to state that the ERC may issue a retail license to a licensee for the supply of electricity for a particular area or areas stated in the license in consultation with the relevant County Government.</p>
	<p>Section 191(1) of the Bill states that all contracts for the sale of electrical energy as well as provision of transmission and distribution network services, between and among licensees, and between licensees and retailers and eligible consumers shall be submitted to the ERC for approval before execution.</p>	<p>Section 191(1) of the Bill should be amended to incorporate the function of the County Governments relating to electricity reticulation and energy regulation Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 191(1) of the Bill should be amended to state that all contracts for the sale of electrical energy as well as provision of transmission and distribution network services, between and among licensees, and between licensees and retailers and eligible consumers shall be</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>The requirement for submission of all contracts for the sale of electrical energy as well as provision of transmission and distribution network services, between and among licensees, and between licensees and retailers and eligible consumers to the ERC, conflicts with the function of the County Governments relating to electricity reticulation and energy regulation in Part 2(8) of the Fourth Schedule to the Constitution.</p>		<p>submitted to the ERC for approval in consultation with the relevant County Government before execution.</p>
	<p>Section 192 of the Bill states that every electricity supply agreement between a retailer and another licensee for the procurement of electrical energy by a retailer for resale to consumers shall be submitted to the ERC before execution.</p> <p>The requirement for submission of every electricity supply agreement between a retailer and another licensee for the procurement of electrical energy by a retailer for resale to consumers conflicts with the function of the County Governments relating to energy regulation in Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 192 of the Bill should be amended to incorporate the function of the County Governments relating to energy regulation Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Section 192 of the Bill should be amended to state that every electricity supply agreement between a retailer and another licensee for the procurement of electrical energy by a retailer for resale to consumers shall be submitted to the ERC and the relevant County Governments before execution.</p>
	<p>Part B of the Fifth Schedule to the Bill distributes the functions of County Governments under the Bill. It does not include the regulation and licensing of electrical energy as a function of County Governments.</p>	<p>Part B of the Fifth Schedule to the Bill should be amended to incorporate the function of the County Governments relating to energy regulation Part 2(8) of the Fourth Schedule to the Constitution.</p>	<p>Part B of the Fifth Schedule to the Bill should be amended to state that the functions of County Governments under the Bill shall include the regulation and licensing of electrical energy comparable to the powers given to the County Governments in licensing of gas reticulation systems.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>The exclusion of the regulation and licensing of electrical energy as a function of County Governments in the Bill conflicts with Part 2(8) of the Fourth Schedule to the Constitution relating to the function of the County Governments relating to energy regulation.</p> <p>Article 186 (2) of the Constitution in relation to the distribution of the functions and powers of National Government and County Governments states that a function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government.</p>		
<p>The Lake Basin Development Authority Act (National)</p>	<p>The Act generally provides for the establishment of the Lake Basin Development Authority to plan and co-ordinate the implementation of development projects in the Lake Victoria catchment area.</p> <p>Section 3 establishes the Authority as a body corporate.</p> <p>Section 8 outlines the functions of the Authority. The Section gives the Authority powers to plan the development of the Area including initiation and supervision of development projects in the Area through the Government, initiating projects for the exploitation of the natural resources in the Area and undertake all the measures specified by the Authority to protect the water and soils of the area.</p>	<p>There is need for a total overhaul of this legislation considering the Constitutional prescriptions relating to the functions of the County Governments to undertake County planning and implementation of policies on natural resources, environmental conservation including water conservation as per Part 2(8) and Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Repeal of the Act in its entirety.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>The Sections conflict with the function of the County Governments relating to County planning and development and implementation of policies on natural resources, environmental conservation including water conservation as stated in Part 2(8) and Part 2(10) of the Fourth Schedule to the Constitution.</p>		
<p>Kerio Valley Development Authority Act (National)</p>	<p>The Act generally provides for the establishment of Kerio Valley Development Authority to plan and co-ordinate the implementation of development projects in the Kerio and Turkwell catchment areas.</p> <p>Section 3 establishes the Authority as a body corporate.</p> <p>Section 10 outlines the functions of the Authority. The Authority is mandated to undertake inter alia planning for the development of the Area and initiate project activities identified for such planning through the Government generally, to co-ordinate the use of the natural resources especially water and ensure that the landowners in the Area undertake all the measures specified by the Authority to protect the water and soils of the Area.</p> <p>Under as per Part 2(8) and Part 2(10) of the Fourth Schedule to the Constitution, County planning and development and implementation of specific National Government policies on natural resources and environmental conservation, including soil and water conservation are a preserve of the County Government.</p>	<p>There is need for a total overhaul of this piece of legislation as the functions assigned to the Authority have been assigned to the County Governments in Part 2(8) and Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Repeal of the Act in its entirety.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
<p>Tana & Athi Rivers Development Authority Act (National)</p>	<p>The Act generally provides for the establishment of the Tana & Athi Rivers Development Authority to advise on the institution and co-ordination of development projects in the area of the Tana River and Athi River Basins.</p> <p>Section 3 establishes the Tana & Athi Rivers Development Authority as a body corporate</p> <p>Section 8 outlines the functions of the Authority. Under this Section, the Authority is mandated to advise the Government generally and the scheduled Ministries in particular on all matters affecting the development of the Area including the apportionment of water resources, to carry out surveys of the Areas to assess alternative demands within the Area on the resources thereof including electric power generation and to establish schemes within the Area so that water, land and other resources are utilized to the best advantage.</p> <p>Under as per Part 2(8) and Part 2(10) of the Fourth Schedule to the Constitution, County planning and development including electricity and gas reticulation and energy regulation and the implementation of government policies on protection and preservation of national resources are a function of the County Governments.</p>	<p>Noting that the functions assigned to the Authority under the Act have been assigned to the County Government in the Constitution, it is recommended to amend this legislation to ensure harmony with Part 2(8) and Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>Amendment of the Act to ensure harmony with the Constitution in relation to the role of County Governments in County planning and development including electricity and gas reticulation and energy regulation and the implementation of government policies on protection and preservation of national resources.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
<p>Ewaso Ng'iro South Basin Development Authority Act</p> <p>(National)</p>	<p>The Act generally provides for the establishment of the Ewaso Ng'iro South Basin Development Authority to plan and co-ordinate the implementation of development projects in the Ewaso Ng'iro South River Basin and catchment areas.</p> <p>Section 3 establishes the Authority as a body corporate with perpetual succession.</p> <p>Section 8 outlines the functions of the Authority. The Act mandates the Authority to undertake inter alia planning for the development of the Area and initiating project activities identified from such planning in the Area through the Government generally, assessing alternative demands within the Area on the natural resources and initiating, operating or implementing to exploit those natural resources including agriculture (both irrigated and rain fed), forestry, or wildlife and tourism industries, electric power generation, mining and fishing and coordinate the use of natural resources, especially water, within the Area.</p> <p>It will be noteworthy that County planning and development and the implementation of policies for management and conservation of the County resources have been assigned to the County Governments in Part 2(8) and Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>A total overhaul of the legislation is necessary to bring it into compliance with Part 2(8) and Part 2(10) of the Fourth Schedule to the Constitution in relation to the role of County Governments in County planning and development and the implementation of policies for management and conservation of the County resources.</p>	<p>Repeal of the Act in its entirety.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>There is thus an overlap on the performance of these functions between the County Government on the one hand and the Authority on the other hand.</p>		
<p>Ewaso Ng'iro North Basin Development Authority Act (National)</p>	<p>The Act generally provides for the establishment of the Ewaso Ng'iro North Basin Development Authority to plan and co-ordinate the implementation of development projects in the Ewaso Ng'iro North River Basin and catchment areas</p> <p>Section 3 establishes the Authority as a body corporate with perpetual succession.</p> <p>Section 8 outlines the functions of the Authority. Among the functions allocated to the Authority include the planning for the development of the Area and initiating project activities identified from such planning in the Area through the Government generally and co-coordinating schemes within the area such that human, water, animal, land and other resources are utilized to the best advantage.</p> <p>Under Part 2(8) and Part 2(10) of the Fourth Schedule to the Constitution, County planning and development and implementation of specific National Government policies on natural resources and environmental conservation, including soil and water conservation are a preserve of the County Government.</p>	<p>A total overhaul of the legislation is necessary to bring it into compliance with Part 2(8) and Part 2(10) of the Fourth Schedule to the Constitution in relation to the role of County Governments in County planning and development and the implementation of policies for management and conservation of the County resources.</p>	<p>Repeal of the Act in its entirety.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
<p>Coast Development Authority Act (National)</p>	<p>The Act generally: provides for the establishment of the Coast Development Authority to plan and co-ordinate the implementation of development projects in whole of the Coast Province and the exclusive economic zone.</p> <p>Section 3 establishes the Authority as a body corporate with perpetual succession.</p> <p>Section 8 sets out the functions to be performed by the Authority. These include planning for the development of the Area and initiating project activities identified from such planning in the development and through the Government generally, initiating, operating, or implementing projects to exploit those natural resources including agriculture (both irrigated and rain fed), forestry, wildlife and tourism industries, electric power generation, mining, and fishing.</p> <p>Under Part 2(8) and Part 2(10) of the Fourth Schedule to the Constitution, County planning and development including electricity and gas reticulation and energy regulation and the implementation of government policies on protection and preservation of national resources are a function of the County Government.</p>	<p>A total overhaul of the legislation is necessary to bring it into compliance with Part 2(8) and Part 2(10) of the Fourth Schedule to the Constitution in relation to the role of County Governments in County planning and development and the implementation of policies for management and conservation of the County resources.</p>	<p>Repeal of the Act in its entirety.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
<p>The Makueni County Government, Draft County Spatial Plan 2017-2027</p> <p>(County)</p>	<p>The Plan does not adhere to the functions of the County Government as set out in the Fourth Schedule to the Constitution. It includes some matters which are under the jurisdiction of the National Government.</p> <p>It also does not incorporate the role of the NLC under Article 67(2)(c), (e) and (h) of the Constitution.</p>	<p>There is need for revision of the Plan to align it with the functions of the County Government as set out in the Fourth Schedule to the Constitution and the roles of the NLC as per Article 67 of the Constitution.</p>	<p>Revision of the Plan.</p>
	<p>Rural Development</p> <p>The strategies proposed for rural development include:</p> <ol style="list-style-type: none"> i. Formulation of land policies on land use planning; ii. Support to development of soil and water conservation structures; iii. Disaster management; iv. Survey and issuance of title deeds; and v. Development control. <p>These are part of the concurrent functions of National Government as per Part 1(21), (22) and (24) of the Fourth Schedule to the Constitution and the County Governments as per Part 2(8), (10) and (12) of the Fourth Schedule to the Constitution.</p> <p>The strategies do not also incorporate the role of the NLC in Article 67(2)(c) and (h) of the Constitution in relation to advising the National Government on a comprehensive programme for the registration of title in land throughout Kenya and monitoring and having oversight responsibilities over land use planning throughout the country.</p>	<p>Revision of the Plan to harmonize the concurrent functions of the National Government as per Part 1(21), (22) and (24) of the Fourth Schedule to the Constitution and to incorporate the role of the NLC as per Article 67(2)(c) and (h) of the Constitution.</p>	<p>The Plan should be revised to state that the County Government shall undertake the proposed measures in consultation with the relevant National Government Authorities and the NLC.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>Urban Development The strategies proposed for rural development include:</p> <ol style="list-style-type: none"> i. Electricity regulation; ii. Issuance of title deeds; and iii. Establishment of an enforcement and development control unit. <p>These are part of the concurrent functions of National Government as per Part 1(21) and (31) of the Fourth Schedule to the Constitution and the County Governments as per Part 2(8) of the Fourth Schedule to the Constitution.</p> <p>The strategies do not also incorporate the role of the NLC in Article 67(2)(c) and (h) of the Constitution in relation to advising the National Government on a comprehensive programme for the registration of title in land throughout Kenya and monitoring and having oversight responsibilities over land use planning throughout the country.</p>	<p>Revision of the Plan to harmonize the concurrent functions of the National Government as per Part 1(21) and (31) of the Fourth Schedule to the Constitution and the County Governments as per Part 2(8) of the Fourth Schedule to the Constitution and to incorporate the role of the NLC as per Article 67(2)(c) and (h) of the Constitution.</p>	<p>The Plan should be revised to state that the County Government shall undertake the proposed measures in consultation with the relevant National Government Authorities and the NLC.</p>
	<p>Paragraph 4.6.3.1 of the Plan proposes the repossession of all illegally acquired land as part of the strategies for infrastructure development.</p> <p>The Paragraph does not incorporate the role of the NLC in Article 67(2)(e) of the Constitution in relation to initiation of investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommending appropriate redress.</p>	<p>The Paragraph should be amended to incorporate the role of the NLC in Article 67(2)(e) of the Constitution in relation to initiation of investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommending appropriate redress.</p>	<p>The Paragraph should be amended to state that the County Government shall repossess all illegally acquired land in consultation with the NLC.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
<p>Strategic Urban Development Plan for Homa Bay Municipality (2008-2030)</p> <p>(County)</p>	<p>The Plan was developed by UN-HABITAT in collaboration with the Municipal Council of Homa Bay.</p> <p>The Plan was developed before promulgation of the Constitution of Kenya, 2010. Therefore, it does not incorporate the devolved system of government, the distribution of functions between the National Government and County Governments in the Fourth Schedule to the Constitution and the roles of government authorities such as the NLC.</p>	<p>There is need to revise the Plan to comply with the Constitution in relation to the roles of the National Government and County Governments.</p>	<p>Revision of the Plan.</p>
	<p>Housing</p> <p>The Plan proposes the following measures in relation to housing:</p> <ul style="list-style-type: none"> i. Servicing of residential areas with the basic infrastructure i.e. water, electricity, roads and sewage system; ii. Preparation of zoning plans for the town to bring order in the development of the town; iii. Preparation of zoning plans for the town to bring order in the development of the town; and iv. Acquisition of more land for housing schemes to cater for low-income earners. <p>The proposed measures include some concurrent functions of the National Government and County Governments as per Part 1(21) and Part 2(8) of the Fourth Schedule to the Constitution in relation to land planning and housing.</p>	<p>Revision of the Plan to harmonize the concurrent functions of the National Government and County Governments as per Part 1(21) and Part 2(8) of the Fourth Schedule to the Constitution and incorporate the role of the NLC as per Article 67(2)(a) of the Constitution in relation to management of public land on behalf of the National Government and the County Governments.</p>	<p>Revision of the Plan to state that in implementation of the measures relating to housing, the Homa Bay County Government shall consult the relevant National Government authorities, including the NLC.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>The proposed measure of acquisition of land does not incorporate the role of the NLC in Article 67(2)(a) of the Constitution in relation to management of public land on behalf of the National Government and the County Governments.</p>		
	<p>Land</p> <p>The Plan proposes some of the following measures in relation to housing:</p> <ul style="list-style-type: none"> i. Development of a comprehensive municipal urban land policy to regulate the supply of land for urban development; and ii. Establishment of a Municipal Land Control Board to regulate land transactions and control the intensive and irrational subdivision of prime agricultural land. <p>The proposed measures include some concurrent functions of the National Government and County Governments as per Part 1(21) and Part 2(8) of the Fourth Schedule to the Constitution in relation to land planning and housing.</p> <p>The proposed measures do not also incorporate the role of the NLC in Article 67(2)(h) of the Constitution in relation to monitoring and having oversight responsibilities over land use planning throughout the country.</p> <p>The proposal for the establishment of a Municipal Land Control Board for purposes of control of development is not incorporated in the Constitution.</p>	<p>Revision of the Plan to harmonize the concurrent functions of the National Government and County Governments as per Part 1(21) and Part 2(8) of the Fourth Schedule to the Constitution and incorporate the role of the NLC as per Article 67(2)(h) of the Constitution in relation to monitoring and having oversight responsibilities over land use planning throughout the country.</p> <p>Revision of the Plan to incorporate the devolved system of government under the Constitution.</p>	<p>Revision of the Plan to state that in implementation of the measures relating to housing, the Homa Bay County Government shall consult the relevant National Government authorities, including the NLC.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>Social Facilities</p> <p>The Plan proposes the following measures in relation to social facilities:</p> <ul style="list-style-type: none"> i. Repossession of grabbed open spaces and undeveloped plots; and ii. Acquisition land for social facilities such as a show ground. <p>The proposed measures do not incorporate the role of the NLC in Article 67(2)(a) and (e) of the Constitution in relation to management of public land on behalf of the National Government and the County Governments and initiation of investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommendation of appropriate redress.</p>	<p>Revision of the Plan to incorporate the roles of the NLC in Article 67(2)(a) and (e) of the Constitution in relation to management of public land on behalf of the National Government and the County Governments and initiation of investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommendation of appropriate redress.</p>	<p>Revision of the Plan to state that in implementation of the measures relating to social facilities, the Homa Bay County Government shall consult the NLC.</p>
<p>The Nairobi City County Regularisation of Developments Act, 2015</p> <p>(County)</p>	<p>The Act generally: provides for the regularisation of unapproved developments.</p> <p>Section 4: provides for the application for regularisation of any unauthorized development, other than those stated under Section 7 to the Act, made in the County prior to the commencement of the Act by any person on:</p> <ul style="list-style-type: none"> a. allotted land belonging to the County Government; or b. private land. <p>Section 7 sets out the unauthorized developments which may not be regularized. They include:</p> <ul style="list-style-type: none"> a. Unauthorized developments on existing or proposed roads; b. unauthorized developments on forest land or river banks; and 	<p>The Act needs to be amended to incorporate the roles of other regulators and agencies such as the NLC and NEMA.</p>	<p>Amendment of the Act.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>c. unauthorized development on public land or land otherwise reserved for public utility.</p> <p>Section 15: establishes the regularisation advisory committee.</p> <p>The Act does not incorporate or factor in the role of other regulators and agencies such as the NLC in Article 67(2)(a) and (h) of the Constitution in relation to management of public land on behalf of the National Government and the County Governments and monitoring and having oversight responsibilities over land use planning throughout the country.</p> <p>It does not also incorporate the role of the National Government in relation to the protection of the environment as per Part 1(22) of the Fourth Schedule to the Constitution.</p>		
<p>The Nairobi City Wards Development Fund Act, 2014 (County)</p>	<p>The Act generally provides for the establishment, administration and use of the Ward Development Fund.</p> <p>Section 4 establishes the Ward Development Fund.</p> <p>Section 5 establishes the County Wards Development Fund Management Committee.</p> <p>Section 7 states that the Fund is for specific projects submitted by the wards and include those falling within the functions of the County Government as contemplated under the Fourth Schedule to the Constitution and community-based projects.</p>	<p>There is need to review and revise the Act to ensure conformity with the Public Finance Management Act and the Constitution.</p>	<p>Amendment of the Act.</p>

Table 18: Matrix Audit for Urban Development Laws (Cont'd)

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>Section 32 establishes a Ward Development Fund Committee for every ward.</p> <p>There is need to review and revise the Act to ensure conformity with the provisions of the Public Finance Management Act and Chapter 12 of the Constitution on Public Finance.</p>		
<p>The Nairobi City County Community and Neighbourhood Associations Engagement Act, 2016</p> <p>(County)</p>	<p>The Act generally: gives statutory recognition to community and neighbourhood initiatives in complementing County Government service delivery; to enable structured co-operation between the County government, residents and businesses, and to generally regulate and facilitate the activities of the associations and to give further effect to Article 10 of the Constitution as regards the principle of participation of the people.</p> <p>The Act does not seem to have effectively provided for the involvement of communities in governance at the local level as envisaged in the Fourth Schedule to the Constitution.</p>	<p>There is need to amend the Act to incorporate the involvement of communities in governance at the local level as envisaged in the Fourth Schedule to the Constitution.</p>	<p>Amendment of the Act.</p>
<p>The Kiambu County Survey and Mapping Bill, 2015</p> <p>(County)</p>	<p>The Bill does not expressly incorporate the role of the NLC in relation to monitoring and oversight of land use planning in Article 67(2)(h) of the Constitution.</p> <p>Section 29 of the Bill states that upon coming into force of the proposed Act, no new registration of land shall be undertaken unless such registration is in accordance to</p>	<p>The Bill should be amended to incorporate the role of the NLC in relation to monitoring and oversight of land use planning as per Article 67(2)(h) of the Constitution.</p> <p>Amendment of the Bill to delete the section due to its unconstitutionality.</p>	<p>Amendment of the Bill.</p> <p>Amendment of the Bill to delete the section.</p>

Name of policy/law	Issue	Rationale/concern	Recommendation
	<p>the amended survey map In respect to the land or holding being registered.</p> <p>Section 29 is unconstitutional. County Governments do not have the mandate to legislate matters relating to registration of land. This is a function of the National Government, in consultation with the NLC under Article 67(2)(c) of the Constitution.</p>		
<p>The Kiambu Spatial Planning Bill, 2015 (County)</p>	<p>The Bill does not expressly incorporate the role of the NLC in relation to monitoring and oversight of land use planning in Article 67(2)(h) of the Constitution.</p>	<p>The Bill should be amended to incorporate the role of the NLC in relation to monitoring and oversight of land use planning.</p>	<p>Amendment of the Bill.</p>
	<p>Part A of the First Schedule to the Bill provides for the content of long term plans as including housing.</p> <p>Housing is a concurrent function of the National Government and County Governments in Part 1(21) and Part 2(8) of the Fourth Schedule to the Constitution. There is therefore need for harmonization of the functions.</p> <p>Communication is a function of the National Government according to Part 1(18) of the Fourth Schedule to the Constitution. Planning functions relating to communication should therefore include consultation of the relevant National Government Authorities.</p>	<p>Amendment of the Schedule to harmonize the concurrent functions between the National Government and County Governments.</p>	<p>Amendment of the Schedule to state that in considering the content of the long-term plans, the County Government shall consult the relevant National Government authorities, if necessary.</p>

Administrative Orders

Name of Administrative Order	Issue	Rationale/concern	Recommendation
<p>Executive Order No. 1 of 2016 (May 2016) (National)</p>	<p>The Administrative Order is in relation to the organization of the Government of the Republic of Kenya, and specifically the Ministries in the National Government (the “Ministries”). It supersedes Executive Order No. 2 of 2013. It was issued by the Office of the President.</p> <p>Some of the functions of the Ministries as set out in the Executive Order involve concurrent functions of the National Government and the County Governments under the Fourth Schedule to the Constitution.</p>	<p>There is need for a clear link between the functions of the Ministries in the National Government with those of the County Governments to avoid duplication and contravention of the functions of the County Executives of the County Governments, which have the mandate of exercising the executive authority of the County under Article 176(1) of the Constitution.</p>	<p>The Executive Order should provide a clear link between the functions of the Ministries and similar functions of the County Governments.</p>
	<p>The functions of the Ministry of Interior and Coordination of National Government include disaster and Emergency Response Coordination.</p> <p>Disaster management is a concurrent function of the National and County Governments under Part 1(24) and Part 2(12) of the Fourth Schedule to the Constitution.</p>	<p>There is need for a clear link between the function of the Ministry in relation to disaster management and the similar function in the County Governments.</p>	<p>The Executive Order should include consultation of the relevant County Executive Committees in matters relating to disaster management.</p>
	<p>The functions of the Ministry of Transport, Infrastructure, Housing and Urban Development include:</p> <ul style="list-style-type: none"> i. Development, Standardisation and Maintenance of Roads; ii. Development and Management of Affordable Housing; 	<p>There is need for a clear link between the functions of the Ministry in relation to:</p> <ul style="list-style-type: none"> i. Development, Standardisation and Maintenance of Roads; ii. Development and Management of Affordable Housing; iii. Shelter and Slum Upgrading; and 	<p>The Executive Order should include consultation of the relevant County Executive Committees in matters relating to:</p> <ul style="list-style-type: none"> i. Development, Standardisation and Maintenance of Roads; ii. Development and Management of

Administrative Orders (Cont'd)

Name of Administrative Order	Issue	Rationale/concern	Recommendation
	<p>iii. Shelter and Slum Upgrading; and iv. Urban Planning and Development.</p> <p>Some of the functions of the Ministry include concurrent functions of the National and County Governments under the Fourth Schedule to the Constitution such as housing, land planning and construction of roads.</p>	<p>iv. Urban Planning and Development, and the similar functions in the County Governments.</p>	<p>Affordable Housing; iii. Shelter and Slum Upgrading; and iv. Urban Planning and Development.</p>
	<p>The functions of the Ministry of Environment and Natural Resources include:</p> <ul style="list-style-type: none"> i. Protection and Conservation of the Natural Environment; and ii. Development of Forests, Re-forestation and Agro-forestry. <p>The above-mentioned functions of the Ministry are concurrent functions of the National and County Governments under Part 1(22) and Part 2(10) of the Fourth Schedule to the Constitution.</p>	<p>There is need for a clear link between the functions of the Ministry in relation to:</p> <ul style="list-style-type: none"> i. Protection and Conservation of the Natural Environment; and ii. Development of Forests, Re-forestation and Agro-forestry, <p>and the similar functions in the County Governments.</p>	<p>The Executive Order should include consultation of the relevant County Executive Committees in matters relating to:</p> <ul style="list-style-type: none"> i. Protection and Conservation of the Natural Environment; and ii. Development of Forests, Re-forestation and Agro-forestry.
	<p>The functions of the Ministry of Water and Irrigation include:</p> <ul style="list-style-type: none"> i. Water and Sewerage Services Management Policy; and ii. Flood control. <p>The above-mentioned functions of the Ministry conflict with storm water management systems and water and sanitation services, which are functions of the County Governments under Part</p>	<p>There is need for a clear link between the functions of the Ministry in relation to:</p> <ul style="list-style-type: none"> i. Water and Sewerage Services Management Policy; and ii. Flood control, and the similar functions in the County Governments. 	<p>The Executive Order should include consultation of the relevant County Executive Committees in matters relating to:</p> <ul style="list-style-type: none"> i. Water and Sewerage Services Management Policy; and ii. Flood control.

Administrative Orders (Cont'd)

Name of Administrative Order	Issue	Rationale/concern	Recommendation
	<p>2(11) of the Fourth Schedule to the Constitution.</p>		
	<p>The functions of the Ministry of Lands and Physical Planning include:</p> <ul style="list-style-type: none"> i. Physical Planning; ii. Survey and Mapping; iii. Land Adjudication; iv. Rural Settlement Planning; v. Land Reclamation; and vi. National Spatial Structure. <p>The above-mentioned functions of the Ministry include the concurrent function of the National Government and County Governments of land planning under Part 1(21) and Part 2(8) the Fourth Schedule to the Constitution.</p>	<p>There is need for a clear link between the functions of the Ministry in relation to:</p> <ul style="list-style-type: none"> i. Water and Sewerage Services Management Policy; and ii. Flood control, and the land planning function of the County Governments. 	<p>The Executive Order should include consultation of the relevant County Executive Committees in matters relating to:</p> <ul style="list-style-type: none"> i. Water and Sewerage Services Management Policy; and ii. Flood control.
	<p>The functions of the Ministry of Energy and Petroleum include:</p> <ul style="list-style-type: none"> i. Rural Electrification Programme; and ii. Energy Regulation, Security and Conservation. <p>The above-mentioned functions of the Ministry include concurrent functions of the National Government and County Governments of under Part 1(31) and Part 2(8) the Fourth Schedule to the Constitution in relation to electricity and energy regulation.</p>	<p>There is need for a clear link between the functions of the Ministry in relation to:</p> <ul style="list-style-type: none"> i. Rural Electrification Programme; and ii. Energy Regulation, Security and Conservation, and the function of the County Governments in relation to electricity and energy regulation. 	<p>The Executive Order should include consultation of the relevant County Executive Committees in matters relating to:</p> <ul style="list-style-type: none"> i. Rural Electrification Programme; and ii. Energy Regulation, Security and Conservation.

8

NATURAL RESOURCES MANAGEMENT

8.1 Introduction

Kenya is endowed with numerous natural resources, including water, forests, wildlife, minerals, fisheries, wetlands and biodiversity. Many of these natural resources are finite. The resources are also for the benefit of the entire citizenry in Kenya. Being part of the environment, there is need for their integrated and sustainable management.

The manner in which natural resources are owned and their use regulated has been the focus of public policy discourse since the colonial period. The constitutional review process dealt with natural resource management under the broad rubric of land and environment. This dual lens was due to the fact that, firstly, natural resources are part of land. The land question that has confronted the country for long is partly a question about access to and exploitation of the country's vast natural resource base. Consequently, rules about land tenure and land use are intricately linked to the manner in which natural resources are managed, used and benefits from their exploitation utilised. At a second level, natural resources are also part of and found in the country's environment. From a conservation standpoint, rules about environmental management have to align with the imperatives of natural resource use. The concept of sustainable development, long accepted as the organising framework for the environmental sector, seeks to balance environmental prerequisites with development objectives so that the process of exploiting natural resources for development purposes does not compromise the environment. Similarly, environmental management has to be undertaken in a manner that enables society to derive benefits from the resources in the environment.

The Constitution captures several important underlying principles in the management of the environment. First, is the recognition that natural resources are public resources whose use should be undertaken for the benefit of the entire Kenyan society. This is encapsulated in the Constitution through the inclusion of natural resources within the definition of public land. Article 62 includes in the definition of public land, forests, minerals and water. The broad rules that govern the management of public land, including the requirements that it must be used for the benefit of all Kenyans has become an important guiding principle in the design of implementing legislation and policy on natural resource management.

The second overriding principle derives from the recognition that natural resources are finite. Wanton destruction and over-exploitation of natural resources will result in their depletion and unavailability for future generations. This is the rationale for the requirement under Article 69 of the Constitution placing an obligation on the state to conserve and sustainably utilise natural resources within the country and ensure that benefits derived from the exploitation of natural resources are shared. People are also obligated to cooperate with state organs, at the national and devolved level, in the process of conserving and ensuring sustainable utilisation of natural resources in Kenya. There is need, therefore, for concrete legislative and policy measures for sustainable management and conservation of natural resources. In auditing legal and policy

enactments in the natural resource sector, it is important to determine the extent to which they promote conservation and sustainability and allow for regeneration of renewable resources.

Thirdly, natural resources are to be utilised. The natural resource base of a country determines its wealth. The Constitution recognises this fact and underscores the need for measures to be put in place for the exploitation of natural resources. In the exploitation process several rules are captured in the Constitution to provide guidance. First is the need for the exploitation to be sustainable. Secondly is the requirement that the benefits to be derived from the exploitation of the resources have to be shared in an equitable and fair manner. While Article 69 of the Constitution provides for benefits-sharing in broad terms, indicating that natural resources must be utilised for the benefit of the people of Kenya, Article 67 specifies that local communities have to benefit from such exploitations.

The process of exploiting natural resources normally involves entering into contracts with those with the expertise, technology and resources to be able to extract the resources from the ground and ensure they are processed. The manner in which those contracts have been entered into in the past have led to disaffection amongst communities, denied countries the required revenues and on occasions resulted in resource-based conflicts. Consequently, the Constitution provides that the process of concluding natural resource agreements must involve the legislature. This is the rationale for Article 71 of the Constitution which provides the enactment of legislation to provide for the ratification by Parliament of certain contracts seeking to provide for a right or concession relating to exploitation of certain natural resources.

Fourth is public participation. The Constitution recognises public participation as an important principle of governance that must be provided for and adhered to in all public processes. Public participation is also to guide the process of enacting and interpreting laws and policies. Courts have struck down laws and policies that have either been developed without public participation or that limit the involvement of the public in their implementation. In addition, Article 69 captures the importance of public participation in natural resource management processes.

In the conservation and management of natural resources, there is contestation between modern and traditional practices. In the introduction of modern laws for conservation, the obtaining philosophy was that traditional and cultural rules and practices were inimical to the sustainable management of natural resources. However, literature demonstrates that this postulation is erroneous. Scholars, such as Professor Okoth Ogendo, have argued that traditional rules promoted conservation and sustainable utilisation of natural resources. Consequently, the Constitution recognises the need to incorporate traditional practices in the management of natural resources and conservation of biodiversity.

In assessing legislations and policies on natural resource management, it is important to assess the extent to which they adhere to and promote the above principles. In addition, the laws and policies have to clarify the ownership and use of natural resources. As regards ownership, they have to clarify that natural resources are the heritage of all Kenyans. The laws and policies have to capture their public nature and demonstrate the role of national and county governments in the ownership, management and use of the natural resources. Secondly, rules put in place for the management and use of the natural resources have to respect, align to and implement the functional divisions under the Fourth Schedule of the Constitution.

Under that Schedule, both national and county governments have a role in the management of natural resources. The manner in which the roles are elaborated must promote collaboration and inter-governmental relations, avoid conflicts, duplication and wastage. The rules must also adhere to the principle that resources follow functions. Consequently, the resource implications of the provisions and vesting of responsibility on the two levels of government must be clear and adhered to in the content of the laws and policies. This chapter reviews policies and laws in three

sub-sectors: water, mining, and forestry. In each of the sectors, the applicable laws and policies are analysed with a view of identifying legislative and policy gaps. This is followed by a summary (in the form of a matrix) of the issues covered in the preceding analyses.

8.2 Water Sector

Water plays an important role in Kenya's socio-economic development, being used for domestic and industrial purposes. Despite this, Kenya remains a water-scarce country necessitating the continued revisions of the legal, policy and institutional framework governing sustainable management of water resources in Kenya. While communities had traditional rules to regulate use of water based on the principle that water was a public good, formal laws developed from the colonial period sought to divest ownership of water resources away from communities and put it in the government. In 2002, as part of liberalisation wave supported by the World Bank, the country adopted a Water Act.

The 2002 Act was enacted in response to the recognition that the existing fractured institutional mandates and outdated legislation were too focused on a demand-driven approach to water management and were not capable of achieving effective, efficient, and integrated water management for poverty alleviation and sustainable development. The reform process focused on separation of water supply and water resources management so that the Ministry of Water and Irrigation's role would be policy formulation and implementation while leaving detailed regulations to a decentralized set of local institutions and parastatal organizations. The 2002 Act made several reforms to the water sector revolving around four themes: separation of management of water resources from the provision of water services; separation of policy making from day-to-day administration and regulation; decentralization of functions to local institutions; and the involvement of non-government entities in the management of water resources and in the provision of water services.

The adoption of the 2010 Constitution elevated water governance to Constitutional status. The right to water was included in the Bill of Rights, where everybody is guaranteed the right to clean and safe water in adequate quantities. The provision includes both issues of water quantity and quality, capturing the dual responsibility of eradicating water scarcity and dealing with water pollution. While the right to water is a socio-economic right requiring legislative and other measures to ensure its realisation, including budgetary allocation, the inclusion of the right within the Constitution is a demonstration of the importance the country attaches to water provision.

The Constitutional provision on functional distribution gives the national government the responsibility, under the Fourth Schedule, relating to use of international waters and water resources, and also the protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular— (c) water protection, securing sufficient residual water, hydraulic engineering and the safety of dams. Additionally, national government has responsibility for marine navigation. On the other hand, counties have the responsibility of implementation of specific national government policies on natural resources and environmental conservation, including soil and water conservation. Other relevant functions for county governments include:

- » Agriculture including (e) fisheries.
- » County health services, including, in particular (g) refuse removal, refuse dumps and solid waste disposal.
- » Control of air pollution, noise pollution, other public nuisances and outdoor advertising.
- » Cultural activities, public entertainment and public amenities, including (i) county parks, beaches and recreation facilities.

- » County transport, including (e) ferries and harbours, excluding the regulation of international and national shipping and matters related thereto.
- » County planning and development, including (a) statistics; (b) land survey and mapping; (c) boundaries and fencing; (d) housing; and (e) electricity and gas reticulation and energy regulation.
- » County public works and services, including (a) storm water management systems in built-up areas; and (b) water and sanitation services.

The upshot of the foregoing is to make provision of water a shared function between national and county governments. It is imperative that a law or policy developed by either the national and county level adhere to this reality and seek to promote the sharing of functions, clarifies the responsibility of each level of government and promote mutual cooperation. The issue has been litigated in the case of Okiya Omtatah Okioti and 3 others versus Nairobi City County and 5 others (2014). The Court held that water provision was a shared function between national and county governments and had to be discharged on the basis of mutual consultation and cooperation. The judgment points out that:

“From the analysis above, it is evident that water provision is essential to the health and wellbeing of citizens, and to the realization of other rights such as the right to health. The importance of its provision and management cannot be underestimated, and the Constitution and international covenants impose positive obligations on the state to ensure that it is available to all and have included an additional obligation on the state to ensure that it is available to vulnerable groups, such as women and communities in marginalized areas of the country.

Further, under the provisions of Article 21(2) of the Constitution, the state has an obligation to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43, under which the right to water is guaranteed. The achievement of this right is dependent on the proper regulation and management of water and sanitation services, and of the entities that have the duty of service provision.

It is thus evident that the provision and management of water services is a shared function, distributed between the two levels of government. Article 6(2) of the Constitution recognizes the fact that the governments at the national and county levels are distinct and inter-dependent. It enjoins them to conduct their mutual relations on the basis of consultation and cooperation. With regard to water provision, they should perform their respective functions in the spirit of consultation and co-operation, and in accordance with the legislation, policies and standards set by the state.”

The role of national government is broadly that of developing policies and standards for the water sector. Regulation is a shared function between national and county governments. Counties have the responsibility of dealing with sanitation within their areas of jurisdiction. Due to its cross-boundary nature, the legislative framework has to promote both inter-country collaboration and also collaboration between national and county government.

8.2.1 National laws and policies

The main laws and policies that govern issues to do with water and sanitation at the national level include the following:

- » Water Act, 2016.
- » Hydrologists Act, 2017.
- » The Kenya Water Institute Act, Act No. 11 of 2001.

- » Kerio Valley Development Authority Act, Chapter 441 Laws of Kenya.
- » Ewaso Ngiro North River Basin Development Authority, Chapter 448 Laws of Kenya.
- » Ewaso Ngiro South River Basin Development Authority, Chapter 447.
- » Irrigation Act, Chapter 347.
- » Tana and Athi River Development Authority Act, Chapter 443 Laws of Kenya
- » The Draft Water Irrigation Bill, 201.
- » National Irrigation Policy.
- » Sessional Policy Number 1 of 1999 on National Policy on Water Resource Management and Development.

The Water Act 2016 seeks to provide for the regulation, management and development of water resources, water and sewerage services and related purposes. The Act recognises the shared responsibility of national and county governments in the management of water in Kenya. However, there are several shortcomings in the Act that must be addressed if it is to meet the requirements of the Constitution and the imperative for collaborative engagement between national and county governments.

First, the Act fails to clarify the specific roles of national and county governments. Although it mentions counties, it proceeds on the premise that water and sanitation services management is mainly a national government function and that the only relevant function of county governments is that in function ten of the 4th Schedule of the Constitution which deals with implementation of specific national government policies on water conservation. In the areas of sanitation and works, for example, the Act does not clearly clarify how the role of national government differs from that of county governments leaving room for duplication and conflict.

The second issue relates to charging for service provision. While the Act empowers Counties to establish Water Service Providers at the county level with powers to levy fees for their services, the role of the Water Services Regulatory Board is not only overbearing, it is designed as a supervisor of the Water Service Providers and by extension county governments, a violation of the constitutional provisions of devolution which clearly recognises the distinct nature of county governments. This is exacerbated by the non-capturing of the principles of devolution as one of the guiding principles for the implementation of the Act.

Thirdly, the Act creates institutions with unwieldy, unclear and sometimes overlapping mandates. A critical review of the institutional architecture reveals that these are modelled along the lines of the Water Act, 2002 with only minimal changes of names and limited infusion of the devolution ethos.

Fourthly, is the challenge of the transitional provisions. The management of assets and liabilities in the water sector while dealt with in extensive provisions in the Water Act, the lack of clarity on the roles of national and county governments makes the handling of assets and liabilities and its transfer in a manner that respects the shared functional responsibility for national and county governments a source of conflict. The Act, for example, provides that a waterworks development agency can develop and maintain a waterworks and enter into an agreement with a county government for the use of waterworks and repayment of loans relating to the waterworks. This is an area where the better approach would be the development of a framework for intergovernmental relations so as to ensure that the engagement is more structured and comprehensive. This will avoid the danger of national government saddling counties with loans relating to water works for which they were not consulted at the inception and development stage.

Despite Kenya having adopted the 2010 Constitution, the policy framework for the water sector still remains the 1999 National Policy on Water Resource Management and Development.

The main goal of the policy is to ensure sustainable and integrated development and management of the water sector. To achieve this, the policy addresses water resources management, water supply and sewerage development, institutional arrangements for water management, and financing of the water sector. The specific objectives of the policy include: (i) the preservation, conservation, and protection of water resources and their sustainable, rational and economical allocation; (ii) the supply of sufficient quantities of good quality water to meet various needs including poverty alleviation while ensuring safe disposal of wastewater and environmental protection; (iii) the establishment of an efficient and effective institutional framework; and (iv) the development of a sound and sustainable financing system for effective water resources management, water supply and sanitation development.

The Policy formed the basis for the development of the Water Act, 2002. This Act has since been replaced by the 2016 Water Act discussed above. The Policy though still remains the 1999 Policy. That policy is outdated, unconstitutional and at variance with devolution. The ongoing efforts to develop a new policy requires to be expedited. In the process the policy has to clarify and not repeat the mistakes in the Water Act, discussed above.

The Irrigation Act, cap. 347 provides for the development, control and improvement of irrigation schemes and related purposes. Irrigation is a core part of the performance of the “agriculture” function given to the county level of government. The Act does not, however, recognize the role of the county government in the fulfilment of its mandate. Responsibility of regulating the irrigation function is vested in the national minister and no role given to county governments. The Act is one of the older laws that have been in place and require revision.

The draft Irrigation Bill 2017 seeks to repeal the Irrigation Act, Cap. 347. It has made attempts to recognize the role of county governments in irrigation matters. It demarcates functions of both the national and county governments, including areas that call for consultation between the two levels of government. It also recognizes the role of the water authority under the Water Act. The Bill proposes the formation of the National Irrigation Authority to replace the National Irrigation Board. However, some few concerns need to be addressed in order to realize the devolved functions more effectively as tabulated below. The draft Irrigation Policy captures the key elements of good policy framework and provides a sound reference point for developing a new irrigation law. It also recognises the ethos of devolution

8.2.2 County Level

The review of the County Acts is captured in the matrix below. The Acts are not unconstitutional but have provisions that require to be amended to align to national legislation.

Table 19: Matrix of Audit for the Water Sector

Name of Policy/Law	Issue	Rationale/Concern	Recommendation
<p>Kenya Water Institute Act No. 11 of 2001</p>	<p><u>Infusion of principles of devolution and general alignment to the Constitution</u></p> <p>Section 4 (1)(a) provides one of the functions of the Institute as to provide services in human resource development, consultancy, research and development in the water sector public sector, state corporations, <u>local authorities</u>, the private sector and all other persons provides for local governments as opposed to county governments.</p> <p>The function under section 4(1) to provide a forum for <u>effective collaboration between the public and private sectors</u> in the development of water and sanitation sectors.</p> <p>Section 5 which provides composition of the council of the institute similarly includes <u>representation by minister responsible for matters of local government</u>.</p>	<p>The Act needs to incorporate the duty of national government to support county governments and duty to ensure cooperation with county governments in order to meet the objects of devolution and uphold the objects of devolution such as decentralization of services.</p>	<p>Align the Act to the Constitution as a whole especially in respect of: sections. 4, 5, and 12 references to permanent secretary and local government, and recognise the role of, collaboration with and support to county governments.</p>
<p>Water Act, 2016</p>	<p><u>Infusion of principles of devolution in water services management</u></p> <p>Section 4 which sets out the principles governing the management of the Act however, lowers the constitutional basis for the implementation of the Act, limiting the provisions to guide implementation to Articles 10, 43, 60 232 and therefore, limiting the place and function of county governments.</p>	<p>The cited provisions of the Constitution do not encompass the entirety of obligations on right to safe and adequate water.</p>	<p>Align the Act as a whole to the Constitution, mainstreaming the principles for implementation of the Act should include chapter VI, principles of devolution, right to water and Articles 69-72 of the Constitution.</p>

Table 19: Matrix of Audit for the Water Sector (Cont'd)

Name of Policy/Law	Issue	Rationale/Concern	Recommendation
	<p>The Act has maintained the Water Services Regulatory Board at sections 70 and 72, establishes the National Water Harvesting and Storage Authority at section 30 with functions exclusive to the national government, the Water Resources Authority at section 11 and water works development agencies under section 65. There is no representation of county government in the Water Services Board under section 71, yet some of its functions set out in section 72 have implications on county government functions. In addition, some of the functions of the Water Resources Authority under section 11 constitutionally belong to counties.</p>	<p>County governments need to be represented in the water services regulation structure since counties have a function of implementing national standards in water services management. There is multiplicity of bodies charged with management of water resources. Some of the provisions may lead to duplication of functions for no-inclusion of county governments e.g. section 30 may result in conflict and duplication of functions between flood control and storm water management by the national and county government.</p>	<p>Revisit and review the establishment of the various institutions without clarity on their inter-relations as well as interplay of functions with the county government.</p> <p>Harmonize and mainstream the role of county governments in the entire chain of institutional framework of provision, regulation and overall management of water service.</p> <p>Amend section 78(b) to define the county assets in context.</p> <p>The Act needs to be reviewed to clarify functions of water development agencies which touch on county assets.</p>
	<p><u>Representation of county governments in institutional structures</u></p> <p>Section 65 establishes the water works development agencies and gives power to the responsible cabinet secretary to determine areas of jurisdiction. It also gives powers over county assets, which are not defined in the context of the Act yet fails to provide for involvement of the county government. Section 67 also leaves to the cabinet secretary to develop the criteria for establishment of the water works development agencies without involvement of county governments. Section 69 provides for handing over of waterworks to a county government which includes assumption</p>	<p>There is need for clearly set out areas for collaboration and consultation between national and county governments e.g. review of the water management strategy and operations affecting county assets such as the water works development agencies.</p>	<p>There is need for streamlining section 69 on management of liabilities between national and county government.</p>

Name of Policy/Law	Issue	Rationale/Concern	Recommendation
	<p>of loans and liabilities of the waterworks yet the county had not been involved in the establishment and operation of the development agency in the first place.</p>		
	<p><u>Separation of powers and functions including collaborative interventions</u></p> <p>Section 74 requires a person to make an application to be licensed as a water service provider to the Regulatory body and a copy to the appropriate county government for purposes of licensing. While section 76 gives county governments power to set up water service providers. The county government is not represented in the regulatory body which may yet license providers to the county, without any provision for consultation. Water service providers are regulated by the (national) regulatory board that has no representation of counties, yet some of the providers are appointed by the counties (section 77).</p> <p>Section 42 provides no clarity on water use regulations and charges between national and county government. While section 42 provides that regulation function may be charged to water user association, there is no relation with or mention of water basin committee which establish user association and which provide for an avenue of participation of county government.</p>	<p>Provision of water services is a shared function between national and county governments. However, there is limited involvement and functions of county governments in regulation of services specific to counties. This clearly creates room for conflict and duplication of functions in provision water services. Under sections 74 – 77 there is no implementation clarity on how the national and county governments will regulate licensing water service providers. While submission of copy of the application for a licence to county government and incorporation of views from the county government are provided for, the representation of the county government is not infused in the composition, actual monitoring including decentralization of information through counties on approved service providers.</p>	<p>Amend the Act to harmonize functions between national and county governments with clear demarcation and collaboration where appropriate for instance in in regulation of water service providers.</p> <p>Review provisions such as sections 29, 30, 42, 26, 64 and 65 to ensure harmonization of functions, effective representation of county government where there are cross-cutting functions such as water service standards, basis water management, and flood management among others.</p> <p>Amend the Act to incorporate participation of county governments in such provision and regulation of provision of water services sections 74, 97 98 as recognised under sections 101, 106 on the role of county government regarding complaints received on service provision and enforcement.</p>

Table 19: Matrix of Audit for the Water Sector (Cont'd)

Name of Policy/Law	Issue	Rationale/Concern	Recommendation
	<p>Section 29 on establishment of water resource users associations should be a function for county governments.</p>		<p>Amend the Act to clarify that water service provision as captured under Section 76 and 79 and other sections of the Act is a function of County Governments.</p>
	<p>Section 95 governs variations of conditions of services by the regulatory body on application by a licensee without provision on involvement of or information to the county government which may be affected. Similarly, there is no provision for involvement of county governments in sections 76 which gives the Board powers regarding of revocations of licenses and sections 97 and 98 give the Regulatory Board powers to vary areas of service provision.</p>	<p>The Board has powers that have implications over provisions of services at the counties, but there is no duty to consult with counties in such instances. This poses potential conflict and disruption of services which directly impacts on service provision at the counties</p>	
	<p>Section 94 makes provisions with respect to provisions of water services to areas that are considered to be not commercially viable. This section 94(1) is couched in terms that are incompatible with the duty to promote realization of the right to water – as it reads: <i>‘Nothing in this Act shall deprive any person or community of water services on the grounds only that provision of such services is not commercially viable’</i> which may be construed as allowing differential treatment or justification for denial of right to water. Section 81 provides that a water service provider may extend its services to rural or developing area with approval of the Regulatory Board.</p>	<p>The Act needs to incorporate and place a positive duty upon both national and county governments to promote provision of services in such areas that would fall under the category of marginalized areas. In reality, some counties are essentially made up of rural and under-developed areas with scarcity of water resources and non-existent water works. It is the duty of the government to provide services (commercial viability) notwithstanding and progressively promote access to water in such areas under affirmative action programs. The rationale for section 84 is not clear, it creates a presumption that operations of water service providers is</p>	<p>Amend section 94 to comply with the duty of governments to progressively realise the right to water in rural and undeveloped areas.</p>

Name of Policy/Law	Issue	Rationale/Concern	Recommendation
		limited to urban areas, yet counties are not necessarily urban or developed.	
	<p><u><i>Role of Counties in Sanitation</i></u></p> <p>The Act Fails to recognise the role of counties in Sanitation. Section 109 empowers the Regulatory Board to impose a sewerage service levy despite this being a County function, while Section 117 which establishes a Water Sector Trust Fund also includes both monies and functions which are for County Government</p>	The distinct and Constitutional nature of County Governments and their role in sewerage and sanitation must be clearly delineated in law.	Amend Section 109 and 117 to remove the role of counties in sewerage and sanitation from the ambit of both the Regulatory Bard and the water Sector Trust Fund
	<p><u><i>Public participation in water services management</i></u></p> <p>Section 87 requires that an application for licence should be subjected to public participation in approval of water service providers by submitting complaints to the Regulatory Board. Section 92 requires that every water service provider to provide a mechanism for public complaints for approved by the Regulatory Board.</p>	This needs to be structured through regulations setting out the procedure and timelines for submission of applications, publication of all applications, feedback from public, appointment and public information of approved licensees. There is no clarity on when complaints mechanism should be provided and approved by the Board. It should be a considered as a condition to licensing and shared to the consumers of services.	Amend sections 87 and 92 or clarify through regulations how public participation in licencing and monitoring provision of water services.
Kerio Valley Development Authority Act, Chapter 441	Section 10 on the functions of the authority duplicates the functions of national and county government in the areas of natural resource management and the imperative of devolution.	With devolution, there is no need for establishment of regional development authorities	Delete the entire Act
Tana and Athi Rivers Development Authority, Cap 443	The Act seeks to advise on the institution and co-ordination of development projects in the area of the Tana River and Athi River Basins.	First this is duplicative of the institutional structures under the Water Act and the county government in the area whose responsibility	Delete the entire Act

Table 19: Matrix of Audit for the Water Sector (Cont'd)

Name of Policy/Law	Issue	Rationale/Concern	Recommendation
		include coordination of development at the local level.	
Ewaso Ng'iro South River Basin Development Authority, Cap 447	The Act provides for the establishment of an Authority to plan and co-ordinate the implementation of development projects in the Ewaso Ng'iro South River Basin and catchment areas.	It conflicts with the provisions of the constitution dealing with devolution and duplicates provisions of the Water Act.	Delete the entire Act
Ewaso Ng'iro North River Basin Development Authority, Cap 448	Provides for the establishment of an Authority to plan and co-ordinate the implementation of development projects in the Ewaso Ng'iro North River Basin and catchment areas.	Conflicts with the provisions of the constitution dealing with devolution and duplicates provisions of the Water Act.	Delete the entire Act
Irrigation Act, Chapter 347	The Act is outdated, refers to institutions like the Water Resource Management Authority and Local Authority that no longer exist, its provisions on compulsory acquisition do not align to the procedures under the Constitution which recognizes roles for county governments too. In fact, the Act is not aligned to devolution at all despite the constitutional recognition that counties have a role in water management and by extension irrigation as part of their agricultural functions of crop husbandry.	The Act no longer serves purpose in view of the Constitution and devolution of water management services.	Delete the entire Act
Irrigation Bill, 2017	<p>Role of County Governments</p> <p>While the Bill recognizes devolution, certain areas fail to entrench this function more effectively through consultation between the national and county governments:</p>	There is need to mainstream the role of counties in functions that affect counties uniformly in the entire Bill. Some areas that would need consultative implementation lack in this regard.	Revise clauses 7(4) 8 and 9(2) and 34 to provide for role of counties.

Name of Policy/Law	Issue	Rationale/Concern	Recommendation
	<ul style="list-style-type: none"> - Section 7(4) The Authority may establish such regional, county, catchments or sub-catchment or sub-county level offices as the Board, may consider necessary. - Section 8 gives responsibility to the Authority over infrastructure, in national or public and small holder schemes, including schemes which traverse or straddle more than one county – there is no consultation with county government as expressly recognized in other provisions yet this function directly involves counties. - Section 9(2) which provides for the composition of the Board of the Authority includes two representatives of county governments to be nominated by the Council of Governors, appointed by the cabinet secretary and approved by the president (section 1(e)). The mode of appointment places county government under the cabinet secretary - There is no harmonization of functions between the national and county governments. Section 14 which provides for the formation of county development units does not elaborate on their composition despite setting out its functions. There is no clarification on how they should link with the Authority. - Transition – the Act under section 34 repeals the Irrigation Act, Cap. 347, transferring assets and liabilities of the National Irrigation Board to the 	<p>Furthermore, the implementing authority which has representation from counties however, leaves the appointment to cabinet secretary which may defeat the principle of consultative government.</p>	

Table 19: Matrix of Audit for the Water Sector (Cont'd)

Name of Policy/Law	Issue	Rationale/Concern	Recommendation
	<p>Authority. This has an implication on the county governments which is not taken into considering the transitional process.</p>		
	<p>Interface with other laws</p> <p>Need to consider more carefully interface of implementation with the structure under the Water Act to avoid duplication and conflict over roles. For instance.</p> <ul style="list-style-type: none"> - Section 2 which has a function on availability of water for irrigation – which is a function of provision of water services. - Section 2(2)(e) on the responsibilities of the cabinet secretary include subject to resource constraints, ensure availability and adequacy of water for irrigation. The cabinet secretary is the one responsible for matters related to irrigation. - Section 15(2)(a) provides that the cabinet secretary will among others and with appropriate consultations approve appropriate tariff structures and make arrangements with the Water Resources Authority in respect of requisition of irrigation water in bulk; - Section 8 provides for the formation of irrigation water user associations in the counties – while the Water Act provides for water user associations. - Section 17 provides for the establishment of administrative and regulatory framework for water storage. 	<p>Implementation of the proposed law in some areas as proposed would implicate on functions under other law, thus, need for harmonization to avoid duplication and conflict of functions.</p>	<p>Clarify water service functions and irrigation service functions under clauses 2, 8 and 17. Where there is an interface, there is need for express consultations with the responsible authority.</p>

Name of Policy/Law	Issue	Rationale/Concern	Recommendation
	<p>- Section 14(3)(f) provides one of the functions of the counties as set up measures to implement adaptation and mitigation to climate change and enhance sustainable environmental management. This function touches on other laws and authorities – e.g. Climate Change Act, EMCA.</p>		
	<p>Section 16(2) provides for compulsory acquisition of land by the cabinet secretary through consultation. This needs to be revised to reflect the role of the National Land Commission.</p> <p>Need clarification of certain terms.</p> <p>The Bill makes reference to the state department of irrigation. The function is not clarified in the Act nor its establishment or how it relates to the Authority.</p> <p>The Bill refers to national or public schemes. Public schemes are not defined.</p>	<p>The Bill makes reference to national or public schemes – only national schemes are defined.</p> <p>The role of the state department for irrigation is not clear, in view of the Irrigation Authority</p>	<p>Relook at clauses 8, 16, 19</p> <p>Review clauses 2, 9(1)(b), 16(2), (3), on the place of the department</p>
<p>Kisii County Water Management and Water and Sanitation Services Act</p>	<ul style="list-style-type: none"> ▪ Scope of application of the Act not clearly defined. ▪ It is not clear whether implementation of the Act is to be done together with the other legislation e.g. Water Act, EMCA ▪ No aspect of public participation including redress mechanisms. ▪ The responsible executive member and department not defined – s.6 (2), 15(2) – administration of the Act not clearly set out. 		

Table 19: Matrix of Audit for the Water Sector (Cont'd)

Name of Policy/Law	Issue	Rationale/Concern	Recommendation
	<ul style="list-style-type: none"> ▪ No standards set out or contemplated through regulations in respect of water service providers <p>Weak regulation of service providers – no issues of licensing, charges, approvals – s. 23.</p> <ul style="list-style-type: none"> ▪ No clear definition of rights and obligations of the county government and citizens. ▪ Demarcation of national public works and county public works not clear. 		
<p>Kisii County Solid Waste Management Act, 2015</p>	<ul style="list-style-type: none"> ▪ Objective set out in generalized terms – not focused to the context of solid waste management. ▪ S. 7(d) – need to be streamlined - all applications need to be published as opposed to publication of each application. ▪ S. 10(d) list of offensive trade waste appears to be exhaustive – may be considered as part of definitions. ▪ S. 11(d) – rationale for the record. ▪ Missing provisions on public participation, dispute resolution, redress for complaints. 		<p>S. 7(e) – who determines what is false representation in an application. Making it an offence not appropriate – should be a basis for disqualification as opposed to an offence</p>
<p>Makueni County Sand Conservation and Utilization Act, 2015</p>	<ul style="list-style-type: none"> ▪ S. 3 – separate purpose and establishment of the authority. ▪ WRUA not defined. ▪ Relationship between the Board, Authority, County, WRUA, Sub-County Committees, Sand Resource Utilization Association. 		<p>Define WRUA</p> <p>Provide for clear demarcation of functions between Relationship between the Board, Authority, County, WRUA, Sub-County Committees, Sand Resource Utilization Association.</p>

Name of Policy/Law	Issue	Rationale/Concern	Recommendation
	<ul style="list-style-type: none"> ▪ S. 19(3) Confirm if domestic purposes is defined. ▪ S. 23 – permissive – undertaking for responsibility of contravention under the Act. ▪ S. 26 should follow after other provisions. 		

8.3 Mining Sector

Despite the potential of the mining sector, the sector has for long been undeveloped contributing 0.8% of GDP in 2010, 0.9% in 2011, 1.1 % in 2012, 0.8 % in 2013, and 0.9% in 2014. For the last five years, with increased discovery of oil and other mineral resources such as coal, niobium, rare earth and gold, there has been increased focus on the sector. This influenced creation of a Ministry of mining in 2013 which has recently been combined with that of petroleum. Other initiatives have included cancellation of mining agreements, efforts to map out the country’s mineral resource potential and review of the country’s legal and policy framework governing mining.

In addition to the new discoveries, other minerals in the country include soda ash, fluorspar, titanium, gold, coal, manganese, iron ore, gypsum, diatomite, chromite, limestone, and silica sand. To ensure that the country sustainably manages its mineral resources and align to both the Constitution and the **Africa Mining Vision**, comprehensive reforms have been undertaken replacing the Mining Act of 1940 with the Mining Act of 2016 and adoption of a Mining and Minerals Policy of 2016.

The **African Mining Vision** seeks transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development. It does this through six overarching goals including: Promoting transparent and accountable mineral sector, where resource rents are optimized and utilized to promote broad economic and social development; promoting good governance of the sector with participation of countries and citizens and equity in distribution of benefits; improving knowledge and optimizing benefits at all levels; harnessing potential of small scale mining for improved rural livelihoods and integration into national economy; fostering sustainable development principles based on environmentally and socially responsible mining; and building human and institutional capacities. By doing so, the Vision seeks to help address the myriad challenges facing the sector

The problems that hinder sustainable exploitation of the mining sector include lack of technical expertise to exploit mineral resources, corruption and governance challenges, nature of mineral development agreements, lack of adequate information on extent of mineral resources, lack of value addition, disregard of small scale miners as a result of large scale focus of the sector, and environment and human rights violations.

The domestication of the Vision was given impetus by the provisions of the 2010 Constitution. The Constitution has several provisions relevant to sustainable mining operations.

The Constitution provides the basic foundation for ensuring effective natural resource governance in Kenya. It clearly defines the tenure of minerals and oils by stating that all minerals and oils form part of public land. This implies that minerals in Kenya are held in trust by the national government on behalf of the people. The Constitution also obligates the national government to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources. It also prescribes strict procedures including ratification by Parliament of some of natural resources agreements.

The Constitution lays a good foundation on revenue sharing. Parliament is mandated to enact legislation ensuring that investments in property benefit local communities and their economies. Further, it requires the State to ensure equitable sharing of benefits accruing from natural resources. The need to ensure equitable sharing of national and local resources throughout Kenya is also listed as one of the objects of devolution of government. The Constitution also requires revenue raised nationally to be shared equitably among the national and county governments. County governments may be given additional allocations from the national government's share of the revenue, either conditionally or unconditionally. Sharing of revenues to counties is predicated on inter alia, the fiscal capacity and efficiency of county governments; and the developmental and other needs of counties. The Constitution also establishes an Equalization Fund into which shall be paid one half percent of all the revenue collected by the national government each year. The fund is to be used to provide basic services to marginalized areas, in order to bring the quality of those services in those areas as much as possible to the level enjoyed by the rest of the nation.

The Chapter on the Bill of Rights seeks to preserve the dignity of individuals and communities, as well as to promote social justice. A number of the rights and fundamental freedoms protected by the bill of rights have direct implications for exploitation of natural resources. These include respect and protection of human dignity, access to information, right to property, right to a clean and healthy environment and access to justice. The Constitution also requires public participation in all important decisions. It requires the state to encourage public participation in the management, protection and conservation of the environment.

8.3.1 National Laws and Policies

The Mining Act replaces the 1940 Mining Act and seeks to align the operations of the sector to the imperatives of the Constitution. Its preamble stipulates that it seeks to give effect to Articles 60, 62(1)(f), 66 (2), 69 and 71 of the Constitution in so far as they relate to mining. The Act seeks to enhance the country's competitiveness as a mining destination by providing rules to regulate the entire mining process from prospecting, mining, processing, refining, treatment and transportation. The Popular Version of the Mining Policy describes the Act as "among the most progressive mining legislations in Africa and the world and seeks to achieve the right balance between investor interest and public interest and aligns the county's mining industry with the industry global trends and best practices."

The Act clearly interprets the provisions of Article 62 of the Constitution by providing that all minerals is property of the Republic of Kenya and vests in the national government in trust for the people of Kenya. Other issues discussed by the Act include mineral rights, institutional architecture for its management, artisanal mining, community engagement and environmental issues in the mining process.

The Act recognises the role of counties in the mining process, and even provides for the Council of county Governors to nominate a representative to Minerals Rights Boards.

One of the areas that has the potential of raising concerns for counties relates to such common materials and what the Act refers to as construction minerals. Under the Act, construction

minerals are stated to “include stones, gravel, sands, soils, clay, volcanic ash, volcanic cinder and any other minerals used for the construction of buildings, roads, dams, aerodromes and landscaping or similar works, and such other minerals as the Cabinet Secretary may from time to time declare to be construction minerals, by notice published in the Gazette.”

There is no other provision relating to these minerals in the Act. Instead Section 7 allows any person to take soil, clay iron, salt or soda from any land which has been the custom of the member of the community to which that person belongs to take the same subject to conditions imposed by the Cabinet Secretary. These two provisions do not recognise the role of counties in relation to regulation of these common mineral related items. Taken together with the amendments to Sections 37, 74 and 85 of the Water Act through the Statute Law Miscellaneous Amendment Act as relates to licensing for water abstraction to exclude abstraction of sea water for purposes of salt, extraction denies county governments from participating in the regulation of these activities.

There has been a lot of disquiet from counties relating to the process of prospecting, licensing and mining operations. Information on who is granted minerals rights and the terms of such grants requires to be availed to counties so as to enhance their involvement and ensure their cooperation in the mining sector. This must be the idea behind the provision of Section 20(l) (n) of the Mining Act. However, to only keep it as a responsibility without elaborating how this would happen does not get to the core of the problem within the sector. Secondly, to make the cooperation process to go through the Principal Secretary and the Cabinet Secretary and take the approach of promoting cooperation amongst counties and not between county governments and the national government does not capture the constitutional requirements of Articles 189 and 6 of the Constitution.

The Mineral Rights Board has extensive powers relating to advising the Cabinet Secretary in relation to the grant, rejection, retention, renewal, suspension, revocation, variation, assignment, trading, tendering, or transfer of Mineral Rights Agreements; the areas suitable for small scale and artisanal mining; the areas where mining operations may be excluded and restricted; the declaration of certain minerals as strategic minerals; cessation, suspension, or curtailment of production in respect of mining licences; fees, charges and royalties payable for a mineral right or mineral. Despite the fact that it deals with issues germane to county governments and it provides the basis for roles that counties perform in relation to mining, there is no representation or consultation with county governments. It is important that section 31 be amended to provide a mechanism for consultation through establishment of a joint committee between national and county governments.

Section 34 provides that county governments shall be notified when the Cabinet Secretary receives an application for a mining right without giving the relevant county government the opportunity to either comment on or even object to the grant of a mining right. This is despite the fact that some rights may be within community land which has not yet been alienated and is thus under the county government. Section 36(2) limits the approval of the county government only to instances where the land is situated within a town, municipality or trading centre. This should be amended to remove the restriction. It is also not clear why the National Land Commission and not the County Government is to be consulted in relation to unregistered community land under Section 38(1) yet this land is vested in County Governments by virtue of Article 63 of the Constitution and the provisions of the Community Land Act.

To avoid misuse of the powers vested in the Cabinet Secretary under Section 40, the section need to be revised to provide that in appropriate cases the Cabinet Secretary may request the National Land Commission to compulsorily acquire land required for mining purposes. This way the provision becomes an enabling as opposed to a circumventing provision for the Cabinet

Secretary. Left in its current form, it has the intention of making the provisions on seeking consent, including from county governments irrelevant.

Employment is normally a thorny issue in mining operations. The provisions of sections 46 and 47 are a step in the right direction especially the requirements for skills transfer and submission of a plan for recruitment and training of local citizens. It is necessary to amend the provisions to ensure that counties are notified of the programme.

Sections 92 to 98 of the Act provide for the process of licensing artisanal miners. While there is provision for an artisanal mining committee to be chaired by a representative of the Governor, the committees have no substantive functions having being given the duty of simply advising the representative of the Director of Mines who is the one with the overall authority of licensing yet is also the Secretary of the committee. These provisions need to be redrafted so that counties have substantive roles in regulation of artisanal miners and in accord with Article 189 of the Constitution.

Section 153(8) deals with compensation of those displaced as a result of mining operations and provides that this can happen through resettlement. Despite the fact that this has implications on planning within counties, the section does not capture the involvement of county governments. This needs to be included through an amendment to the section.

The Mining and Minerals Policy was developed at the same time as the Mining Act and adopted in 2016. It has the same challenges as the Mining Act identified above.

Fundamentally, as the policy document stipulating the Government's position in the mining Sector, it is telling that the Policy does not comprehensively recognise and detail the role of County Governments in the regulation and exploitation of the Sector. Counties are, for example only mentioned in the section of the Implementation when it comes to benefit sharing. The substantive Policy statements also has short sentences on role of counties in providing access to community land for mining operations. In addition, counties are mentioned in the context of benefit sharing and the responsibility of Government to develop a framework for participation of, amongst others counties in mining investments. Due to the importance of the Mining Sector, the Policy should have a stand alone and more robust provision on the role of counties.

The Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016 provides for the implementation of Article 71 of the Constitution. The Act applies to transactions that involve both national and county governments. There are several definitions in the Act that are not included in the Act which should be captured. Secondly, Section 5 provides that the after entering into a transaction, the beneficiary should submit an agreement or other instrument evidencing the transaction to the responsible Cabinet Secretary responsible. This seems to provide that ratification is only happening after an agreement is already entered into. This defeats the intended purposes, since ratification should be the basis for legitimizing public participation on ratification before a formal agreement can be entered into. The section also seems to leave the discretion with the particular responsible ministry. Yet there is requirement for a register of all such transactions. It is not clear how this should be implemented, considering that the ministry responsible could be any that is charged with matters concerning a particular natural resource.

The procedure should be revised. Where an application is submitted falling under Article 71 transactions, the responsible cabinet secretary should review and develop a memorandum for presentation to the applicable ministry and eventual tabling in parliament as well as corresponding public participation. While section 7 provides that validity is subject to ratification, then there is need for qualification for definition of agreement as section 5 already suggests that an agreement is already in place.

There is also need for better coordination since there is no central receiving authority of such transactions (at whatever level). There is a risk that an agreement not vetted to be qualified under the Act may be approved without being subjected to the necessary ratification. Yet, there is no opportunity for taking back an agreement that ought not to be enforced. Thus, the need for a proper internal approval process before submission to Parliament without compromising the need for expedition of commercial transactions.

Section 9 needs to provide minimum standards but not a closed list of considerations to be made. Considerations should also consider aspects of sustainable development. In addition, the procedure for consultation of county governments needs to be elaborated on in the Act.

8.3.2 County Level

At the County level, despite the keen interest and public discussions that many counties have had over issues to do with mining, only Makueni out of the ten selected counties has enacted a law that addresses mining issues. This is Makueni County Sand Utilisation and Harvesting Act. Even then, this law only addresses sand harvesting. Garissa is also in the process of developing a policy and laws to regulate aspects of mining in the County. An assessment of its constitutionality is contained in the matrix below.

Table 20: Audit Matrix for the Mining Sector

Name of Policy/Law	Issue	Rationale/Concern	Recommendation
Mining Act, 2016	Section 20(1)(n) The provision requiring the Director of Mines to promote cooperation among county governments places county governments in subservient positioning to the Director of mines.	County governments have a role to play in management of natural resources, thus, engagement with the national government should be one of cooperation and not control.	Develop a comprehensive provision on intergovernmental relations and cooperation with counties as relates to mining operations.
	Under Section 25 (5)(c) a person shall cease to be a member of the Board of Corporation if s/he is convicted of an offence and sentenced to imprisonment for a term not exceeding six months	The section bars petty offenders and those convicted of misdemeanours from holding public office while allowing those convicted of major crimes that attract a sentence of more than six months to hold office.	There is need for review of qualification of members of the Board. Section 25 (5) (c) to read ‘... convicted and sentenced to a term exceeding six months’.
	Section 31 (2) provides for formation of committees to advise the Mineral Rights Board on matters relating to mining of minerals.	There is need for more representations at all levels through formation of joint committees which will ensure that the Board is adequately advised on gender, youth and inclusiveness especially in relation to artisanal small-scale mining as envisioned in the mining policy.	Section 31 (2) of the Act be amended to include formation of joint committees as envisioned under Article 189 (2) of the Constitution.
	Section 34 (1) provides that the Cabinet Secretary shall give notice to the relevant county government when an application for a grant of a mineral right is made; yet the Act does not provide for input by the county government on the said application. Furthermore, whereas the Act allows the land owner or community to object to a grant of licence, it does not provide for objection by the relevant county government. Section 34 on mineral rights applications does not inculcate participation by the county government as envisioned under Article 189 of the Constitution.	The Act fails to recognise that county governments hold unregistered community land in trust on behalf of communities according to Article 63 (3) of the Constitution. Therefore, there should be an opportunity for their input in approvals relating to their jurisdiction.	Amend section 34(1) to allow input of County government. Section 34 to be amended to allow participation by the County Government on assessment of mineral rights. Section 34(4) be amended to allow objection by county government to grant of licence.

Name of Policy/Law	Issue	Rationale/Concern	Recommendation
	Section 38 on consent of National Land Commission in relation to unregistered community land.	Unregistered Community Land is vested in county governments and not the National Land Commission.	Remove National Land Commission and replace with relevant County Government. Allow for consultation of the Commission when such need arises.
	Section 40 provides for the cabinet secretary to compulsorily acquire land for mining prospects where consent is unreasonably withheld, in the opinion of the cabinet secretary contrary to the national interest.	Redraft to enable the cabinet Secretary to seek for the National Land Commission to compulsorily acquire the land in appropriate instances.	Section 40 on compulsory acquisition needs to be redrafted to allow the necessary authority (National Land Commission) to undertake the necessary acquisition.
	Sections 47 and 48 on employment does not make provision for sharing the plan with relevant county government	Enhance involvement of counties in monitoring employment of locals in mining operation.	Sections 92-98 to be amended to provide for substantive involvement of artisanal mining committees in the licensing process.
	Sections 92-98 which cover operations of artisanal miners does not recognise the substantive role of county governments. Section 94 only provides for the governor to be a member of the artisanal mining committee which plays an advisory role to the director.		
	Section 153 on compensation to be amended to involve county governments.		Amend section 153(8) on resettlement to provide for the involvement of relevant county governments.
Natural Resources (Classes of Transactions) Subject to Ratification Act, 2016	Section 5 and 9 Section 5 seems to leave the discretion with the particular responsible ministry. Yet there is requirement for a register of all such transactions. It is not clear how this should be implementing, considering that the ministry responsible could be any that is charged with matters concerning a particular natural resource.	It is important to make the procedure fool proof – to ensure there is proper checks and balances in entering agreements.	Amend Sections 5 and 9 to clarify procedure for ratification and consultation of county governments in matters affecting exploitation of resources at the counties.

Name of Policy/Law	Issue	Rationale/Concern	Recommendation
	<p>It does not provide for input by the county government where the agreement is in respect of a resource at a particular county.</p> <p>Section 9 limits considerations to be made in determining qualification of an agreement.</p>		
Makueni County Sand Conservation and Utilization Act, 2015	<p>Section 4 makes reference to WRUAs and which are under the supervision of the Authority, and form part of the composition of the Authority's Board. However, the WRUA are not defined under the Act</p>	<p>The WRUA are not defined or established anywhere under the Act. Its role, composition is therefore unclear.</p>	<p>Provide a definition of WRUA</p>
	<p>Section 4 establishes the County Sand Conservation and Utilization Authority charged with general supervision and co- the Authority ordination over all matters relating to sand conservation and utilization.</p> <p>Section 7 establishes a Board and Secretariat to execute the Authority's mandate, however, there is an interchange of terms between the Authority and Board. There are several bodies under the Act with a function under the Act. The Authority under section 4, the WRUA referred to under section 4; Sub-County Committees under section 12 and Sand Resource Utilization Association</p>	<p>The relationship between the Board, Authority, County, WRUA, the Committee, Sub-County Committees, Sand Resource Utilization Association is not very clear.</p>	<p>Reconsider the structure of the Authority to clarify the need to have both the Authority and the Board.</p> <p>Section 3 – separate purpose and establishment of the authority.</p> <p>Provide for clear demarcation of functions between the Board, Authority, County, WRUA, Sub-County Committees, and Sand Resource Utilization Association. Consider including provisions to regulate transboundary concerns in sand utilization.</p>
	<p>Sections 8, 9, 10 refers to the Committee – it is not clear which Committee is being referenced to.</p>	<p>There is need to clarify which Committee is being referred to.</p>	<p>Amend Section 2 to include definition of Committee.</p>
	<p>Section 19(3) requires licensing for harvesting of sand unless it is intended for domestic purposes. The scope of use of sand for domestic purposes is not clear thus open to abuse and difficult to implement.</p>	<p>There is need for harmonization of the licensing procedures and the responsible authority – Executive Committee, or the Authority.</p>	<p>Relook at various aspects of sand harvesting and utilization and their regulation. Clarify section 19 on use of sand for domestic purposes.</p>

Table 21: Audit Matrix for the Mining Sector (Cont'd)

Name of Policy/Law	Issue	Rationale/Concern	Recommendation
	<p>Section 20 provides for licensing by the government on an annual basis unless authorized by the Executive Committee Member of persons transporting sand.</p> <p>Section 21 provides for licencing trade or business in sand by the Authority.</p>		
	<p>Section 23 – permissive – undertaking for responsibility of contravention under the Act.</p>	<p>There is no provision for community participation or input by Associations on licencing of applications for harvesting and utilization of sand.</p>	<p>Include in the licencing procedure place of public complaints or feedback. Section 23 should set out the criteria – as couched it is permissive in nature</p>
	<p>Section 26 provides for penalties for violation of the Act. It gives graduated penalties. Section 30 provides for penalty for violating prescribed timelines for harvesting of sand. Comparatively, this provision gives a harsh penalty and does not follow the graduated sentencing provided under the omnibus section 26 penalties.</p>	<p>The penalties need to be harmonized. There should be other conditions besides imprisonment and fines. Section 26 penalties seem to focus only on loader, driver, or vehicle owner. It leaves out other aspects of dealing in sand such as companies, businesses etc. The persons mentioned may only be agents of the business owners.</p>	<p>Section 26 should follow after other provisions unless the provision is limited to the licensing violations only under which it is placed.</p> <p>Section 26 needs to be expanded to capture all aspects of violations in respect of dealings in sand. There should be other forms of punishment since the Act deals with a natural resource e.g. forfeiture, restoration of sites etc.</p>

8.4 Forestry sector

A core function of international law on forests is the promotion of sustainable forest management. The sustainable management of forests, including conservation and utilization, is an important element of the international and national objectives to attain sustainable development. Significant policy directions can be derived from international law, policy and other literature from the past two decades. Agenda 21 calls on states to focus on enhancing protection, sustainable management and conservation of all types of forests, including rehabilitation of degraded areas, and reversing deforestation through rehabilitation, afforestation or reforestation. States are also called upon to undertake policy and legislative measures to sustain the multiple roles and functions of all types of forests, forest lands and woodlands. This is supported by the 1992 UN Statement on Forest Principles which reiterates that forest conservation correlates with the entire range of environmental and development issues and opportunities, including the right to socio-economic development on a sustainable basis.

Notably, both Agenda 21 and the Forest Principles, adopted at the same Rio Conference, refer to ‘all types of forests’, which could be interpreted to include trees that are grown outside formal forest

areas, including on privately or community owned agricultural lands. Further, there is a focus on sustaining the multiple roles and functions of these forests. These functions are important because they quite often determine the management objectives that law and policy will prescribe. The 2010 Global Forests Assessment demarcates three key functions of forests: productive; social and economic; and the protective. The productive function involves managing the economic and social utility of forest resources to national economies and forest-dependent local communities.

This simultaneously requires ensuring that production and harvesting are sustainable and do not compromise the management options of future generations for productive or other functions of forests. The socio-economic function, related to the productive role, recognizes that forests provide a wide variety of social and economic benefits, ranging from quantifiable economic values associated with forest products, to less tangible services and contributions to society. Forest health and vitality, which are instrumental to continuity of a forest ecosystem, highlight the central role of the protective function. The term 'protective function' is applied to denote forests, or forest areas, that have soil and water conservation as the main function or management objective.

In order to attain sustainability in forest management, it is necessary that forest law, policy, and management actions endeavour to balance the productive (socio-economic) and protective (ecological) functions of forests. This has critical implications at the national level, where there is an ongoing tension between the need to ensure maintenance of ecological integrity and health of forests, which need is pitted against that of societies to derive their livelihoods from the forest resources. Creating this balance is at the heart of the efforts towards sustainable forest development.

Policy and law on forest must be geared towards achieving sustainability. Sustainable forest management, according to a 2008 UN General Assembly resolution on forests, is a dynamic concept that aims to maintain and enhance the economic, social and environmental values of all types of forests, for the benefit of present and future generations. This resolution emphasizes that forests, including trees outside forests, provide multiple economic, social and environmental benefits, in which case the sustainable management of forests contributes significantly to sustainable development and poverty.

Forest resources in Kenya are valuable natural endowment that must be sustainably managed for present and future generations. They rank high as some of the most important national assets in terms of economic, environmental, social and cultural values. The woody resources provide utility products (timber, poles, fuel wood and pulp wood) as well as a variety of non-wood products (resin, honey, medicine). Forests are critical for mitigating climate change through carbon sequestration; conservation of biological diversity, water and soil; as well as being major habitats for wildlife.

Kenya's forest sector has experienced poor performance in the past and improving forest governance has been an implicit objective in forest sector reforms over the past ten years. Some of the key challenges facing the forest sector include, excision and encroachment for agriculture and human settlement, inadequate stakeholder participation in forest conservation, poor enforcement of laws and policies, illegal charcoal production, population pressure and climate change. This calls for strengthening of legal, policy and institutional frameworks and improved governance. Key features of good forest governance include adherence to the rule of law, transparency and low levels of corruption, stakeholder inputs in decision-making, accountability of all officials, low regulatory burden and political stability.

Effective governance of the forest sector remains one of the country's greatest challenges. The colonial administration set up the Forest Department headed by the Chief Conservator of Forests to superintend matters affecting the forest sector in 1942. The next half a century saw massive

reduction in the country's forest cover from 60% to just about 2% in the 1990s. In 1963, when Kenya got its independence the forest cover stood at approximately 11 percent. Due to poor forest governance, deforestation reduced Kenya's forest cover to just about 2% in the late 1990s, with the country losing approximately 12,000 hectares of forest a year despite the government's attempts to alleviate the problem. Whereas the drivers of deforestation are diverse, the main ones in Kenya are conversion to agricultural land in response to demographic pressures; unsustainable production methods and consumption patterns for charcoal; degazetting of forest lands; ineffective institutions and enforcement; corruption; illegal logging; and unclear land tenure for forest-adjacent peoples.

Prior to 2007, Kenya did not have a forest policy articulated in a specific official sessional paper. This position changed as a result of increased degradation and encroachment of forests in the early 2000s seeing heightened pressure on government and court cases against forest excision. The Ndungu Land Commission report on illegal and irregular allocations of public land pointed out the massive excision of forests and its negative implications. Against this background, the Forest Act of 2005 was adopted and a Forest Policy of 2007 also promulgated so as to improve forest governance as well as to reverse the trend in forest degradation and destruction.

The Forest Act, 2005, focused on sustainability in forest management, which included both conservation, and rational utilization for the economic and social development of the country. It does this through focusing on all categories of forests be they state, community or private forests. It established the Kenya Forest Services as the main institution for forest management and also developed clear frameworks for community and stakeholder participation in forest governance, recognising the role of community forest associations.

The overall spirit of the Act was decentralisation of authority and responsibilities in management of forests, and promotion of partnership through increased access of benefits to the communities and promotion of sustainable forest management through management plans.

The Constitution provided the framework for enhanced conservation and management of forest resources. Article 42 captures the overarching right to a clean environment, where forest conservation is anchored due to the contributions of forests to livelihoods and environmental management. In addition, Article 69 obligates the State to "ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits." The Article places similar obligations on the state as regards the entire environment and all natural resources and requires national and county governments to play a positive role in sustainable natural resource management.

In addition, Article 69 recognises the past massive forest degradation and the need for afforestation and reforestation programmes in the country by obligating the state to work towards a tree cover of a minimum of 10 percent of the land area. In addition, Article 10 provides that adherence must be had to the principle of governance including public participation and devolution.

Articles 186 and 187 then broadly discuss the functions of the national and county government. Within the context of forest management, the Fourth Schedule indicates that national government has the responsibility of protecting the environment and natural resources so as to establish a durable and sustainable system of development on environment and natural resources. As part of this task it will develop national policies and laws. On the other hand, the county government is mainly charged with the responsibility of implementation of specific national policies on natural resources. A reading of the Fourth Schedule, however, does not explicitly mention forests. However, the definition of natural resource included in Article 261 of the Constitution includes forests. Therefore, although the Fourth Schedule as part of the elaboration of natural resource responsibilities mentions other resources like water and wildlife, the national government role

includes forests. In addition, as relates to county governments, their responsibility to implement specific national government policies on natural resource conservation specifically mentions forests.

Consequently, the management of forests is a shared function between national and county governments which should be undertaken based on the principles of cooperation under Article 189 and Article 6 of the Constitution. Forest management is intricately linked to land tenure. Indeed, part of the reasons for forest encroachment is as a result of desire for land for agriculture and human settlement and other development activities. Consequently, rules for land tenure impact on how forest are conserved. The constitutional provisions on land clearly demonstrate that forests exist on all three tenure categories, public land, community land and private land with forest being explicitly mentioned in Article 62 on public land and Article 63 on community land.

8.4.1 National Laws and Policies

The Forest Conservation and Management Act, 2016 was assented to on 31st August, 2016 and came into force on 31st March, 2017. It replaced the Forests Act, 2005. This was done so as to align forest conservation and management with the imperatives of the Constitution. This is captured from the preamble, which indicates that its purposes is to “give effect to Article 69 of the Constitution with regard to forest resources; to provide for the development and sustainable management, including conservation and rational utilization of all forest resources for the socio-economic development of the country.”

The Act is the most aligned to the Constitution and the spirit of devolution under the natural resource sector. It captures devolution and cooperation between national and county governments throughout its content. In Section 4 that deals with principles to guide the implementation of the law, the Act stipulates that one of the guiding principles is that of consultation and cooperation between national and county governments. This is fundamental for it ensures that in interpreting the provisions of the Act and dealing with the roles of various levels of government, regard shall be had to the need to promote consultative and cooperative engagement. The Act also recognises that forests can exist on all three tenure categories of land recognised by the Constitution, and as the audit of the land sector laws demonstrate, county governments have responsibilities over certain categories of land, including unregistered community land and some categories of public land. They would, consequently have a role to play in the management of forest found in the lands under their purview. Indeed, the definition of concession under the Act stipulates that this can be granted either in a national or county forest. This is also evident in the definition of a forest manager which for public forests include the Kenya Forest Service or a County Government.

Section 6 provides for the development, every five years, of a public Forest Strategy. The Cabinet Secretary is required to develop this strategy so as to provide the plans and programmes that the government intends to implement with a view to ensuring protection, conservation and management of forests and forest resources. Importantly, the process of its development requires public participation, which should include involvement of counties and their governments. Importantly, the strategy is also required to include functional responsibility of national and county governments in relation to forest resource management. However, section 6 should be amended so as to explicitly provide for the participation of county governments in the development of the national forest strategy or alternatively require county government to adopt county specific strategies

The principal agency for managing forests in Kenya, especially public forests, is the Kenya Forest Service. The Service is appointed by the Cabinet Secretary. While its principal role relates to public forests, it can also help in preparation of management plans for community forests and private forests when requested and in consultation with the owner. It will also establish and implement

benefit sharing arrangements. The Service is also given the responsibility of assisting county governments in building capacity in forestry and forest management in counties. This is good practice for it recognises the collaboration required to enhance forest conservation in Kenya and the need to address knowledge asymmetry. In addition, the Board of the Kenya Forest Service has a representative of the Council of Governors to be appointed by the Cabinet Secretary. This is good practice which should be maintained. There is need to rethink the appointment process so as to remove the fact that the person is appointed by the Cabinet Secretary and just provide that a representative of the Council of Governors nominated by the Council. This will enhance the status of the nominee and avoid it looking like an agent of the Cabinet Secretary.

Section 17 of the Act provides for the establishment of the Kenya Forest College and vests it with responsibilities to provide education and training in forestry issues. At the same time, section 22 details the functions of the Kenya Forest Research Institute established under the Science, Technology and Innovation Act, which includes conducting expert training courses in forestry and related natural resource areas. This has the potential of duplicating each other. There is need to amend the two sections to either clarify the distinction of the two institutions or combine them into one, most probably by expanding the role of KEFRI. The link between the two and KFS also needs to be strengthened.

The Act gives the county governments a clear function in forest management, including the involvement of county assemblies. Section 21 requires every county to implement national policies on forest management and conservation; manage all forest on public land that falls within the constitutional control of counties by virtue of Article 62(2) of the Constitution; prepare an annual report for the Kenya Forest Service on the activities that a county has undertaken in implementation of the national policies on forest conservation and management.

Section 20 of the Act provides for the establishment of forest conservation areas and committees. This section is problematic and may raise both constitutional and practicality challenges. It requires to be amended. First the establishment of the conservation areas derives more from the functions of the Service under section 8 as opposed to that of the Board. It is not necessary to make the separation from Service and Board as the section seeks to do. It should broadly be the responsibility of the Service acting through the Board to establish the conservation areas. The more problematic issue with the provision is its lack of clarity on the distinctness of national and county governments and the required inter-governmental relations. First, it is not clear whether a conservation area will be per county or cross-county. This clarity is necessary and has implications on the membership of the committee and the links with county governments. The Forest Conservation Committee is a committee of the Board of KFS and has a County executive committee member as part of its membership. In addition, it is expected to make recommendations to the Board and also to the relevant county governments. It is not clear how the recommendations would be made to the County government yet the committee is neither a committee of the county government or one formed based on the provisions of the Intergovernmental Relations Act.

Section 21(b) and 30(2) need to be harmonised. While section 30(2) defines public forests, it does not capture the public forests for which county governments have been vested responsibility under section 21(b). This must be aligned so that those under the control of counties are also considered as public forests under the Act.

There are no proper reasons why community forests are excluded from applying to the Service under Section 32 for technical advice once registered and instead this responsibility is to the County Governments. This is despite the fact that one of the functions of the Service is to assist community forest associations that so desire with the preparation of forest management plans. Section 32 should be amended to make this a role for KFS too. This is also an area for greater inter-

governmental collaboration between national and county government. This way, even private owners under section 33 can also seek and obtain technical advice from county governments.

Sections 29, 35(2), 50 and 74 make reference to a director general, a member of the board of trustees of the forest trust fund (section 29) with functions in declaration and reversion of provisional forests (section 35) and sustainable management of cross-border forest resources (section 74). It is not clear who this person is. It is not clear if this is supposed to be the Chief Conservator of Forests.

Section 37 on the establishment of arboreta, recreational parks, planting of trees and the required consultation by the county government with residents of the area and between the county and the Service is an excellent provision on the required collaborative arrangements between national and county governments.

Under section 40 of the Act, there is need for an amendment to include dissemination of information to the public as well as county government on protected tree species as part of county government function of implementing national policies on forestry. In addition, there is need to provide for information to the county government where concession has been granted in respect of public forests.

Public participation in governance of any kind is a right that ought to be facilitated. The provisions under section 48 seem to restrict this by providing for registration which may be denied. There should be active and deliberate effort to facilitate community participation. Considering aspects of devolution, the section requires too strict requirements (articles, financial regulations, development of forest management plan etc.). This may not pass the constitutionality test, it may well be that no group will seek or qualify to be an association, which would mean that there is no aspect of public participation in forest management. It is the positive duty of the government to facilitate community participation. A good example is the establishment of water user associations under the Water Act. The service should facilitate such associations and provide capacity as well as regulation of their functions.

Sections 43 and 45 need to be harmonised. Section 44 provides for management of plantation forests which may be done by either license, agreement, contract etc. while section 45 provides for agreements for forest management through a competitive process. Section 45 provides for better regulation (competitiveness of the process, call for applications, criteria and conditions for forest management). This is also an area which needs information sharing and collaboration with county government. If adopted under section 45, proposals under section 43 would be catered for.

In addition to incentives, the Act ought to provide a duty to increase forest cover to the required minimum and ensure that the forest cover is preserved. This can be implemented through Regulations. Part of the compliance and responsibility of the Forest Service is to realise this function and report on gradual compliance. Furthermore, Agroforestry, the practice of mixing afforestation with agriculture should also be incorporated and recognised as a way of sustainable use of forests.

Despite The adoption of the Forest Act in 2016, the Country still does not have a National Forest Policy, which is aligned to the Constitution, recognises and incorporates devolution and is aligned to the 2016 Act. In fact, the Policy that continues to govern the section is Sessional paper Number 1 of 1968. When the 2005 Forest Act was enacted, an accompanying sessional Paper Number 9 of 2005 was also developed. However, there is no evidence of its discussions in Parliament and eventually adoption as a Sessional Paper. The continued existence and implementation of the 2016 Forest Act without adoption of the accompanying Forests Policy is problematic. There is, therefore, need to adopt the Policy so as to anchor the governance of the sector and provide

policy clarity on the relationship between national and county governments in the management of the sector. Lack of Policy coherence may be partly to blame for the failure of many counties to sign the Transition Implementation Plans that were prepared by the Kenya Forest Service to enable counties undertake some functions relating to the management of forests. The Draft National Forest Policy should be debated and with input from Counties adopted as a matter of urgency.

The Timber Act was enacted in 1970 and provides for the control of the sale and export of timber; for the grading, inspection and marking of timber; and control of the handling of timber in transit. Timber is defined by the Act as “wood of any tree grown in Kenya, Tanzania or Uganda, whether such wood is unsawn, hewn, sawn or machined.” The Act regulates the process of grading timber and subsequently the sale and export of timber. The Act came into force in 1971 and does not align with the Constitution and neither does it mention devolution. It does not recognise the categories of forests from which timber can be derived and their management implications.

The Act was enacted to Govern the Transition to Devolved Governments following the 2013 elections which ushered in the full roll out of devolution as captured in the Constitution. A key entity under the Act was the Transition Authority. In Gazette Supplement Number 116 of 2013, the TA published legal notices specifying certain functions that had been transferred to County Governments. As relates to Counties, this included “Forestry including farm forestry extension services, forests and game reserves formerly managed by Local Authorities, excluding forests managed by Kenya Forest Service, National Water Towers Agency and Private forests.’

To provide for more orderly implementation of these transferred functions, the Kenya Forest Service prepared Transition Implementation Plans (TIPS) to be signed between it and respective County Governments. Just a few Counties, though have to date signed these. It is important that the development and implementation of the TIPS be expressly anchored in the Forest Act 2016. In addition, KFS should consult counties in the content of the TIPS and also undertake capacity building for counties on forest management.

The State Corporations Act empowers the National Government to establish State Corporations to undertake certain functions. On 13th April, 2012 through Legal Notice Number 27, then President Mwai Kibaki established the Kenya Water Towers Agency as a State Corporation. The Agency was established to help continue with the functions that was being undertaken by the Mau Task Force which had been established under the office of the Prime Minister’s to explore modalities of rehabilitation the Mau Forest Complex.

The Functions of the Agency include to coordinate and oversee the protection, conservation and sustainable management of water towers; coordinate and oversee recovery and restoration of forest lands, wetlands and biodiversity hot spots; promote the implementation of sustainable livelihood programmes in the water towers in accordance with natural resources conservation ; mobilize resources; identify water towers and water sheds for protection in consultation with other stakeholders; and assess and monitor rehabilitation, conservation and management activities in the water towers.

The Legal notice defines a Water Tower as an area that acts as a receptacle for rain water and that stores water in the aquifers underneath it and gradually releases the water to the springs and springs emanating from it.

While conservation of water towers is essential, especially in light of the massive forest destruction taking place in the country, there are two problems with the mandate and operations of the Agency. First, it is based solely on a legal notice. Without a comprehensive legal and policy foundation, it is very easy for the Agency to encroach onto the mandate of other agencies, including the Kenya Forest Service and Water Resources Authority. Secondly, the legal notice was

promulgated before Counties were formed. It does not recognise the existence and operations of Counties. Its recent action to establish several more water towers, has been done without regard to the role of counties in the conservation of water Towers.

It is important that comprehensive conservation be undertaken on the future role and relevance of the agency and it should only be retained if the above two issues are addressed.

When the international community adopted the Convention on Biological Diversity in 1992, they grappled with the place of traditional knowledge in the conservation of biodiversity. Article 8(1) (j) captured the place of traditional knowledge, requiring that subject to national legislation, knowledge, innovation and practices of communities relevant to conservation of biodiversity must be respected, preserved and maintained.

The adoption of the Constitution grappled with the place of cultural practices in governance processes. At the Bomas Constitutional Conference, a working group on culture had to be established to deal with this issue resulting in the development of Article 11 of the Constitution. In addition to recognising the place of culture in the country's governance, it also called for the enactment of a specific legislation to “ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.”

The enactment of the Protection of Traditional Knowledge and Cultural Expressions Act, 2016 is an implementation of Article 11, 40 and 69 of the Constitution. Article 69 on obligations of the state relating to environment and natural resource management and conservation, requires the state to “protect and enhance intellectual property, in, and indigenous knowledge of, biodiversity and the genetic resources of the communities.” The Act is relevant for its provisions on use of traditional knowledge for conservation, a practice that is prevalence in the forest sector.

The Act provides that in its implementation, Article 10 and the principles and values contained therein shall be the guide. One of the principles is that of devolution. Consequently, the roles of counties and county governments become an important aspect of the implementation of the Act. It is for this reason that Section 4 details the roles of county governments, to include:

- » Registration of traditional knowledge and expression within the county for purposes of recognition.
- » the receipt, documentation, storage and updating of information relating to traditional knowledge and cultural expressions from communities within a county.
- » preservation and conservation of traditional knowledge and cultural expressions.
- » the protection and promotion of the traditional knowledge and cultural expressions of communities within a county, the facilitation of collaboration, access to or the sharing of information and data relating to traditional knowledge and cultural expressions between county governments.
- » the allocation of financial resources for the promotion of cultural activities.
- » the establishment of mechanisms for using culture as a tool for conflict resolution and promotion of cohesion.

The national government on the other hand has responsibilities for:

- » the establishment and maintenance of the repository at the Kenya Copyright Board;
- » the promotion and conservation of traditional knowledge and cultural expressions of communities in Kenya;
- » the protection of traditional knowledge and cultural expressions from misuse and misappropriation;

- » the facilitation of access of information and the sharing of information and data relating to traditional knowledge and cultural expressions.

In the process of protection of traditional knowledge, counties are required to collect information, document and register traditional knowledge within their counties for purposes of recognition. In addition, if a community shares the knowledge with another community outside Kenya, the national and county government shall register the owners of traditional knowledge in Kenya and maintain relevant records. While Section 7 recognises the role of national and county governments in the registration process, it is important that either regulations be developed or the section be amended to clarify the exact roles of counties and national governments in the registration process. This will ensure mutual cooperation and avoid conflicts in the registration process through overlaps of mandates or burden on one level of government due to the financial requirements for the registration process.

Section 8 is very elaborate and clear on the roles of counties and national governments. Section 7 needs to be amended to link it with the clarity in Section 8. Section 12 dealing with compulsory licence only captures a role for the Cabinet Secretary in the exercise of powers akin to compulsory acquisition under Article 40 of the Constitution. Despite the fact that counties are involved in the registration process under sections 7, 8 and 10, they are not involved at all in the process of grant of compulsory licence for exploitation or in alternative dispute resolution. This provision needs to be amended to provide for consultation and/or notification of the relevant county government.

Section 15 is worded in almost similar terms as the earlier section dealing with traditional knowledge save that this deals with culture. While it recognises the role of both national and county governments, section 15(6) on resolution of competing claims suggests that this can be dealt with by either national or county governments without clarifying under which circumstance either level can be involved, opening room for forum shopping and duplication.

Sections 18 and 19 also capture the cooperation between national and county governments in their implementation. The same applies to section 22. One of the most controversial issues is access and benefit sharing, an issue dealt with by section 24 of the Act. The section provides for mutual agreements to be entered into as the basis for benefit sharing and further that the Cabinet Secretary shall develop further regulations. It is important that counties in which the traditional knowledge and cultural practices which are commercially exploited derive are part of the benefit sharing discussions. This is a critical aspect of ensuring that the implementation of the ABS regime as captured in the Nagoya Protocol to the CBD involved counties.

Similarly, sections 27, 28 and 29 on compulsory licensing by the Cabinet Secretary should capture role of counties. For example, section 29 refers to use of public consultations spaces under the County Government Act but does not go as far as providing for this being done through the relevant county government.

Table 21: Audit Matrix for the Forestry Sub-sector

Name of Policy/Law	Issue	Rationale/Concern	Recommendation
Forest Conservation and Management Act	Section 6 on role of Cabinet Secretary in the development of a National Forest Strategy does not explicitly capture role of counties in the development and implementation of the Strategy.	Counties are expected to implement national standards on policy management and therefore, should be involved in formulation, implementation as well as review.	Amend Act as per the matrix to ensure alignment of few problematic sections to devolution.
			Amend to provide for participation of counties in development of Strategy and their responsibilities to develop county specific strategies aligned to the national strategy. Counties to consider developing county specific policies and laws on forestry.
	Section 20 on Forest Conservation Areas and Committees does not demonstrate the modalities for intergovernmental relationships between national and county governments.	This is a shared function that needs collaboration between the two levels of government.	Amend to respect the distinctness of county governments and provide for clear relationships.
	Section 17 and 22 on Kenya Forest College and KEFRI have duplicative functions on training and education.	The two agencies may have turf wars, duplicate each other roles and result in resource wastage.	Rethink the existence of both institutions or better align the difference in their functions.
	Section 32 recognises the place of the community in forest management through community forest associations. However, the provisions as couched would have the effect of stifling community participation, requiring stringent requirements for registration.	The Kenya Forest Service as well as County need to have a function in supporting community forest associations in order to facilitate public participation in forest management. Communities need to be supported and empowered to participate.	Section 32 should be amended to vest responsibility for technical advice to community forest association on KFS in addition to county government.
	Sections 34 Since public forest can also fall under jurisdiction of county governments, include role of county in the process of variation of boundaries. Sections 40 and 44 provide for grant of concessions on public forests but fails to include role of counties where such decisions affect	Interventions involving county governments call for collaboration between national and county governments. Matters of boundaries and concessions on forests affect counties.	Make provision for information transmission to counties once boundaries of public forest within their jurisdiction are altered. Amend section 40 to include information dissemination to the public and county government and section 44 to

Name of Policy/Law	Issue	Rationale/Concern	Recommendation
	public forests in particular counties.		provide information to county governments where concessions have been granted in respect of public forests that relate to counties.
National Forest Policy	The current Forest Policy was adopted before the advent of devolution and is not aligned to the 2010 Constitution or the 2016 Act.		Enact a new National Forest Policy.
Timber Act	Does not recognise devolution and is not aligned to Constitution of Kenya 2010.		Repeal and enact a new law.
Transition to Devolved Act	Anchorage of Transition Implementation Plans.	While Transition Authority transferred certain functions to Counties under the Act, the consequential preparation of TIPS by KFS requires more sound legal footing.	Amend the Forest and Management Act to provide for TIPS
Kenya Water Towers Agency	Established by a legal notice without robust legal and policy basis.	The legal notice does not recognise the existence of counties and the place of devolution in management of water towers.	Incorporate conservation of water towers in a legal framework. Rationalise the role of various agencies including KFS, Water Resources Authority and also the place of counties in conservation of various categories of water towers.
Protection of Traditional Knowledge and Cultural Expressions Act, 2016	Several sections do not clearly define role of counties.		Amend Act at sections 7, 12, 15, 24, 27, 28 and 29 to clarify role of counties.

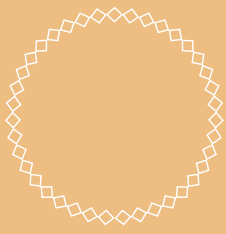
8.5 Conclusion and Recommendations

The Constitution envisages that the management of natural resources will be a cooperative process with national government having overall responsibility for policy formulation and being vested with majority of the natural resources in trust for the people of Kenya. This audit has revealed that in the field of water, forests and mining, the forest sector is the most compliant. The Water Act is the most problematic and requires substantive revisions to ensure it complies with the ethos of devolution. Additionally, the laws creating the various regional development authorities which are established along river basins require to be repealed for being unconstitutional. Following their repeal, new legislation may be enacted if it is desired that combination of counties manage a specific region or managed a shared resource. In developing such new legislation respect must be had to the role of national and county governments.

Additionally, a comprehensive audit of the natural resource sector needs to deal with the remaining subsectors including wildlife and also address the framework environmental legislation, The Environmental Management and Coordination Act and those on climate change and also the Petroleum (Exploration, Development and Production) Bill once enacted into law.

The Audit reveals that the natural resource sector is largely a shared regulatory space between national and county government. It requires greater collaboration and consultation so as to ensure that the policies and legislation clarify the responsibility of each level of government and promote collaborative regulation out of the appreciation that natural resources are the heritage of all Kenyans and that they are a finite resource requiring sustainable and prudent management.

While Counties have responsibility for aspects of natural resource management, there is very little legislative interventions by the counties under review in this sector. This leaves the regulatory field solely to national level legislation. It is imperative that counties exercise their legislative mandate to provide clarity on the discharge of their mandate in the natural resource sector and provide linkages with national level policies and laws.



CONCLUSION AND RECOMMENDATIONS

While the Constitution provided for two transition phases for unbundling and clarifying government competencies at the two levels, this goal was not achieved. As a result of the incomplete transition, there is a persistence of the old order (laws, policies, and practices) across all the sectors reviewed. In all the sectors, the majority of the laws applicable pre-date the current Constitution and this means that the new roles of the county governments have not been taken into account.

There is space for clarification of the ambiguities above through consultation and cooperation between the two levels of government. However, another major finding is that there is inadequate consultation and cooperation between the two levels of government that can support and facilitate a holistic development of laws and policies at both levels of government. While formal structures exist, some of which are provided for by law and existing policies, they have not been used to clear the challenges of development of laws and policies for both levels.

In some instances, laws that are passed at the national level contradict each other and this reveals low levels of coordination, even among players within the same level of government. A glaring example of this is the contradictory and confusing provisions in the laws relating to land (see Chapter 5). A more effective mechanism of cooperation between the sectors and the levels of government can contribute to more harmonious legislation and policies.

Finally, the audit review reveals a dearth of capacity at both levels of government to facilitate the effective development of laws and policies that are clear, coherent, comprehensive and compliant with the applicable constitutional provisions. Accordingly, a major recommendation from this report is the systematic growing of capacity of national government sectoral bodies and the county departments to enhance the capacity to develop laws and policies that can actually facilitate the pursuit of the respective mandates without some of the challenges highlighted above.

APPENDICES

List of Legislation and Policies Reviewed

National government

Health Sector

Health Act (Act No. 21 of 2017)

Kenya Medical Supplies Authority Act (Act No. 20 of 2013)

HIV/AIDS Prevention and Control Act (Act No 14 of 2006)

Pharmacy and Poisons Board Act.

Public Health Act (This one interphases with the Health Act)

Mental Health Act (Cap 248)

Anatomy Act (Cap 249)

Narcotic Drugs and Psychotropic Substances Act (Act No. 4 of 1994).

Public Health Officers (Training, Registration and Licensing) Act (Act no. 12 of 2013)

Kenya Medical Training College Act (Cap 261)

National Authority for the Campaign Against Alcohol and Drug Abuse Act (Act No. 14 of 2012)

The Alcoholic Drinks Control Act (Act No. 4 of 2012)

Human Tissues Act (Cap 252)

Counsellors and Psychologists Act (Act No. 14 of 2014).

Clinical Officers (Training, Registration and Licensing) Act (Cap 260)

Health Records and Information Managers Act (Act No. of 15 of 2016)

Malaria Prevention Act (Cap 246)

Clinical Officers (Training, registration and Licensing) Act (Act No. 20 of 2017)

National Health Insurance Fund Act (Act No. 9 of 1998)

Regulations

Pharmacy and Poisons Board Rules

(Legal Notice No. 86 of 1957 as amended by L.N. 443/1957, L.N. 332/1958, L.N. 426/1958, L.N. 498/1958, L.N. 550/1959, L.N. 114/1960, L.N. 587/1961, L.N. 242/1963, L.N. 631/1963, L.N. 92/1964, L.N. 365/1964, L.N. 115/1968, L.N. 125/1969, L.N. 248/1969, L.N. 41/1971, L.N. 120/1984, L.N. 52/1984, L.N. 51/1985, L.N. 61/2002, L.N. 91/2004 and L.N. 191/2010)

Pharmacy and Poisons (Conduct of Inquiries) Rules

(Legal Notice No. 52 of 1985)

Pharmacy and Poisons (Registration of Drugs) Rules

(Legal Notice No. 147 of 1981 as amended by L.N. 142/1991 and L.N. 192/2010)

Pharmacy and Poisons (Control of Drugs) Rules

(Legal Notice No. 180 of 1969 as amended by L.N. 247/1969, L.N. 228/1974)

Mental Health Act (Board Meetings) Regulations, 2000

Narcotic Drugs and Psychotropic Substances (Control) Restraint and Forfeiture) Regulations, 1997.

(L.N. 547/1997)

Narcotic Drugs and Psychotropic Substances (Control) (Seizure, Analysis and Disposal) Regulations, 2006.

(L.N. 16/20

Agriculture Sector

Agricultural Development Corporation (Cap. 444)

Agricultural Finance Corporation (Cap. 323)

Agriculture, and Food Authority (AFFA) Act 2013,

Animal Diseases (Cap. 364)

Animal Technicians (No. 10 Of 2010)

Biosafety (No. 2 Of 2009)

Branding Of Stock (Cap. 357)

Bukura Agricultural College (No. 5 Of 1999)

Cattle Cleansing (Cap. 358)

Climate Change(No. 11 Of 2016)

Community Land Act

Co-Operative Societies (Cap. 490)

Dairy Industry (Cap. 336)

Ewaso Ng'iro North River Basin Development Authority (Cap. 448)

Ewaso Ng'iro South River Basin Development Authority (Cap. 447)

Fertilizers And Animal Foodstuffs (Cap. 345)

Fisheries Management And Development(No. 35 Of 2016)
 Forest Conservation And Management(No. 34 Of 2016)
 Hide, Skin And Leather Trade (Cap. 359)
 Irrigation (Cap. 347)
 Kenya Meat Commission (Cap. 363)
 Kenya Plant Health Inspectorate Service (No. 54 Of 2012)
 Kerio Valley Development Authority (Cap. 441)
 Lake Basin Development Authority (Cap. 442)
 Land Act
 Land Registration Act
 Meat Control (Cap. 356)
 National Cereals And Produce Board (Cap. 338)
 National Drought Management Authority (No. 4 Of 2016)
 Pest Control Products (Cap. 346)
 Physical Planning Act
 Plant Protection (Cap. 324)
 Protection Of Traditional Knowledge And Cultural Expressions(No. 33 Of 2016)
 Pyrethrum Act (No. 22 Of 2013)
 Seeds And Plant Varieties (Cap. 326)
 Stock And Produce Theft (Cap. 355)
 Tana And Athi Rivers Development Authority (Cap. 443)
 The Crops Act 2013
 The Kenya Agricultural And Livestock Research Act 2013
 Tobacco Control (No. 4 Of 2007)
 Wildlife Conservation And Management (No. 47 Of 2013)

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